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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

against

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1974

No.

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

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ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

JURISDICTIONAL STATEMENT

The Commissioner and former Acting Commissioner of the New York State Department of Social Services (hereinafter "appellants") appeal from a Judgment and Order of a three-judge district court (HAYS, C. J., dissenting) for the Southern and Eastern Districts of New York entered in the above consolidated actions on August 15, 1974. The ac-

tions were heard by the three-judge district court upon remand from the United States Court of Appeals for the Second Circuit "to consider the constitutional issues raised by appellees [plaintiffs below]." *Taylor* v. *Lavine*, —— F 2d ——, Doc. Nos. 669 & 701, May 14, 1974, Slip op. p. 3470 (OAKES, C.J. dissenting). A Petition for a Writ of Certiorari to review the Second Circuit decision was filed in this Court on August 2, 1974 (Doc. No. 74-5054).

The Judgment and Order of August 15, 1974 declares 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) unconstitutional under the Due Process Clause of the Fourteenth Amendment and permanently enjoins their enforcement. The portions of the regulations placed in issue below by appellees authorize the pro-ration of shelter allowances payable to public assistance recipients upon a factual finding that a non-paying ("non-contributing") lodger who is neither an applicant nor a recipient under the terms of the regulations is sharing living quarters with a recipient. The recipient's share of shelter cost is then paid from public funds while the non-recipient lodger's share is excluded. In invalidating the regulations, the district court majority found that the separation and exclusion of the lodger's share irrebuttably presumed that the recipient's need for public assistance and for living space had diminished because of the presence of the lodger and that such presumptions were potentially inconsistent with the recipient's individual circumstances.

Opinions Below

The majority and dissenting opinions of the three-judge district court on remand from the Second Circuit, dated August 5, 1974, are unreported and are reproduced in Appendix "A" to this Jurisdictional Statement. They are also reproduced in Appendix "A" to the Supplement to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in *Taylor*

v. *Lavine* (Doc. No. 74-5054) filed in this Court on or about August 25, 1974.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit, dated May 14, 1974, are unreported and are reproduced in Appendix "B" to this Jurisdictional Statement. They are also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine* (Doc. No. 74-5054) filed in this Court on or about August 2, 1974.

The opinion of the United States District Court for the Southern District of New York in *Hurley* v. *Van Lare* (BAUMAN, D.J.), dated October 3, 1973, is reported at 365 F. Supp. 186 and is reproduced in Appendix "C" to this Jurisdictional Statement. It is also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine*.

The memorandum and order of the United States District Court for the Eastern District of New York in *Taylor* v. *Lavine* (WEINSTEIN, D.J.), dated October 10, 1973, is unreported and is reproduced in Appendix "D" to this Jurisdictional Statement. It is also reproduced in the Appendix to the Petition for Certiorari in *Taylor* v. *Lavine*.

Jurisdiction

The jurisdiction of this Court to consider the instant appeal is conferred by 28 U.S.C. § 1253.

The Judgment and Order appealed from was entered in the district court on August 15, 1974. The Notice of Appeal to this Court was filed in the district court on August 20, 1974. The Judgment and Order and the Notice of Appeal are reproduced respectively in Appendix "E" and Appendix "F" to this Jurisdictional Statement. The Judgment and Order and the Notice of Appeal are also reproduced in Appendix "B" and Appendix "C" to the Supplement to the Petition for Certiorari in *Taylor* v. *Lavine*.

The jurisdiction of the district courts was conferred by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Regulations Involved

18 N.Y.C.R.R. § 352.30 states in part:

352.30 *Persons included in the budget*

• • •

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.31 formerly stated in part:

352.31 *Estimate of need and application of income*

(a) *For applicant or recipient.*

• • •

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

• • •

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are

no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).[*]

Additional related statutes and regulations appear in Appendix "G" to this Jurisdictional Statement.

Questions Presented

1. Whether the pro-ration of shelter cost among all persons living in a household and the exclusion of the non-paying lodger's share of that cost from public assistance shelter allowance payments pursuant to 18 N.Y.C.R.R. § 352.30(d) establish any irrebuttable presumption in violation of the recipient's rights to due process of law?

2. Whether the distinction under § 352.30(d) between public assistance recipients who share their households with lodgers and those who do not violates the recipient's rights to equal protection of the laws?

3. Whether the district court erred in refusing to allow evidence of substantial contributions of household furnishing made to appellee Hurley by her lodger prior to the

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[*] Effective July 26, 1974, § 352.31 (a)(3)(iv) was amended to provide:

> (3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:
>
> • • •
>
> (iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part.

events giving rise to the action and in striking conforming allegations and documentation from appellees' answer?

4. Whether the district court erred in refusing to dismiss the claims of appellees Taylor and Otey on the ground of mootness notwithstanding the court's apparent recognition that neither appellee continued to have a justiciable grievance against the named public officials?

5. Whether the district court erred in defining the appellee class to include recipients who share households with paying and non-paying lodgers and in invalidating § 352.30(d) as to both categories of lodgers notwithstanding that appellees shared their households with non-paying lodgers and that no recipient could claim to be aggrieved by the paying lodger provisions of § 352.30(d)?

Statement of the Case

A. The New York Shelter Allowance Program

The categorical assistance programs administered by the New York State Department of Social Services and the local districts provide for the separate determination of shelter needs and for the payment of a shelter allowance as a distinct component of the total public assistance grant.* Social Services Law § 131-a subds. 1 and 2 (App.

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* At present, the State and local districts administer AFDC and Home Relief—Veterans Assistance. The cost of the AFDC program is shared by the federal government (50%), the State (25%) and the local districts (25%). The cost of the Home Relief-Veterans Assistance program is shared by the State (50%) and the local districts (50%). The two basic components of a grant issued under either program are a "pre-added" or "basic" grant for food, clothing and incidentals and a shelter allowance. Social Services Law § 131-a subd. 2; 18 N.Y.C.R.R. §§ 352.2-352.4.

"G" pp. 91a-92a);* 18 N.Y.C.R.R. §§ 352.1-352.4. The consideration of shelter as a separate item of need is accepted by HEW. Simplified Methods for Determining Needs, Method II, HEW 1964.** As of 1971, 49 of the 50 states provided separate shelter allowances for public assistance programs. *Boucher* v. *Minter*, 349 F. Supp. 1240, 1242 n. 2 [D. Mass. 1972 (3 judge court)].

Shelter allowances for the payment of rent are provided pursuant to 18 N.Y.C.R.R. § 352.3(a) (App. "G", pp. 93a-94a).*** Under the terms of the regulations, each of the 58 local districts must file a schedule setting forth monthly maximum allowances, by number of rooms, which are sufficient "to permit all persons to obtain housing in accordance with standards of public health in the community." The local district then pays the recipient's actual cost of rent up to the scheduled maximum. 18 N.Y.C.R.R. § 352.3(a).**** In practice, the local districts have used both the number of rooms and family size to

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* References preceded by App. and a letter refer to the Appendices to this Jurisdictional Statement.

** Simplified Methods for Determining Needs is defendants' Exhibit C in evidence before the three-judge district court. Prior to the expiration of appellees' time to move with respect to this Jurisdictional Statement, appellants will request the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the proceedings below pursuant to Rule 12 of the Rules of the Supreme Court of the United States.

*** Shelter allowances are also available for recipient owned property (Social Services Law § 131-a subd. 1; 18 N.Y.C.R.R. § 352.4) and for temporary housing in hotels and motels (18 N.Y.C.R.R. § 352.3 [f]).

**** A new subdivision § 352.3(a) setting forth a state-wide shelter allowance schedule by county and public assistance family size has been published in Title 18 of the New York Code Rules and Regulations. The effective date of the new schedule is projected as January 1, 1975. However, the schedule has been filed by 14 counties as their schedules under § 352.3(a) as presently in effect. The new local schedules do not affect the principle of pro-ration as expressed in § 352.30(d).

determine appropriate shelter allowances and have often exceeded the scheduled maximums. The effect of allowing local exceptions to the maximums has been that the vast majority of recipients receive shelter allowances equal to their rent.*

Both in fact and in law, shelter is the common and shared need of all the members of a given household. Thus an AFDC eligible caretaker and child living alone in effect receive two shelter payments, one for the caretaker relative and one for the child, reflecting the fact the shelter need of each is a share of the housing unit in which they reside and that the entitlement of each is a pro-rated portion of the allowed rent. *Boucher* v. *Minter*, 349 F. Supp. *supra* at 1244. 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv)** simply provide method for determining and compensating the shelter needs of public assistance recipients when they choose to expand their households by adding an additional person (or persons) who is neither an applicant nor recipient of public assistance and

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* The affidavit and testimony of Linda Harmon, a Senior Program Analyst for the N.Y.D.S.S., received by the three-judge district court puts the figure at approximately 93% of the statewide caseload. The remaining 7% consists largely of employed recipients who benefit from certain income exemptions and therefore have extra money available for rent.

** Section 352.30(d) is the operational regulation at issue in both actions. Section 352.31(a)(3)(iv), both in the form considered by the courts below and as amended, merely describes circumstances where the application of § 352.30(d) is appropriate. It was therefore properly regarded as superfluous in the prior proceedings. The single exception is Judge Oakes dissenting opinion in the Second Circuit wherein he suggests that on remand the three-judge district court find § 352.31(a)(3)(iv) a "violation of equal protection on the basis of sex" (App. "B" p. 42a). The suggestion was rejected by Judge Weinstein, writing for the district court majority (App. "A" p. 18a). However, any need to consider the alleged sex discrimination issue was removed by the recent amendment to § 352.31(a)(3)(iv) which deletes the terms "female" and "man" and substitutes "person". See pp. 4-5, *ante*.

who is therefore not entitled to have his (or her or their) shelter need met from public funds.* The procedure has been approvd in principle by HEW (Simplified Methods For Determining Needs, Methods II and III) and with specific reference to these actions.**

18 N.Y.C.R.R. § 352.30(d) defines a lodger as a "non-legally responsible relative" or "unrelated person" living in a household formerly occupied exclusively by one or more recipients. He may be a paying or a non-paying ("non-contributing") lodger.*** With respect to the former, § 352.30(d) provides that amount paid in excess $15 each month (or $60 for boarding lodgers) shall be treated as income to the recipient. With respect to the latter and only portion of the regulation placed issue below by appellees, the shelter allowance, or rent in the vast majority of cases, is pro-rated among the number of people living in the household and an amount equal to the lodger's fractional share excluded from the shelter allowance. The object of the pro-ration procedure is to determine the lodger's shelter need in terms of the number of persons with whom shelter is in fact shared; to separate the lodger's shelter need from that of the recipient (or recipients); and to

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* For convenience, the lodger and recipient are hereinafter referred to in the masculine singular unless otherwise appears from the text.

** Letter from Elmer Smith, Regional Commissioner for Region II, HEW on David Kellogg, Senior attorney, NYDSS, dated November 15, 1974, Exhibit "D" to appellant's application for a Stay Pending Disposition of this appeal filed in this Court on or about Sept. 12, 1974 (Application No. 161). The letter states in part: "HEW has permitted states to prorate shelter allowances to reflect the percentage of public assistance recipients in a household. Such proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases".

*** The additional distinction in § 352.30(d) between boarding lodgers and non-boarding lodgers has not effect on the pro-ration of the shelter allowance.

preclude the payment of the lodger's share of rent from public assistance funds.

The factual determinations made in support of pro-ration are as follows: 1) a "non-legally responsible relative" or "unrelated person" is living in the household; 2) his failure to demonstrate eligibility for public assistance; 3) his failure to pay his fractional share of the rent; 4) the size of the public assistance family; and 5) the amount of the shelter allowance. These determinations are made initially by the local social services agency after investigation. They are then subject to review at a state "fair hearing" at the instance of the recipient. 18 N.Y.C.R.R. Part 358.

In the event that a non-recipient chooses to expand his household by inviting one or more public assistance recipients to share his living quarters, the New York shelter allowance program again distinguishes the shelter need of the non-recipient from that of the recipient and pays a shelter allowance to the recipient in proportion to his share of the rent for the combined household. 18 N.Y.C.R.R. § 352.3(c) (App. "G" p. 94a).*

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* The only difference between § 352.3(c) and 352.30(d) is that under the former, the actual rent is pro-rated and the recipient obtains his share up to the appropriate maximum whereas under the latter, the shelter allowance is pro-rated. However, since the shelter allowance largely equals rent, the recipient receives his fair proportion of the actual cost of shelter regardless of whether § 352.3(c) or § 352.30(d) is applied. Section 352.3(c) was recently invalidated as inconsistent with 45 C.F.R. § 233.90(a) in *Battle* v. *Lavine*, —— A D 2d —— (2d Dept. 1974), rev'g. a State Supreme Court decision (Index No. 7385/73). The opinions are reproduced in Appendix "I". Principle reliance was placed on District Judge Bauman's opinion in *Hurley* v. *Van Lare* (App. "C") which was subsequently reversed by the Second Circuit (App. "B"). However, review of the *Battle* opinions suggests that § 352.3(c) was not properly in issue since petitioner there complained about the termination of her shelter allowance not its pro-ration, and the question of whether she was sharing shelter with anyone except her

(footnote continued on following page)

The purpose of the non-paying lodger portions of § 352.3(d) is apparent. Since he has not demonstrated his eligibility for public assistance, the non-paying lodger is not entitled to have his need for shelter (or any other allowed item of need) considered in computing a public assistance budget or paid from public assistance funds. Further, since he must either have the capacity to pay his share of the rent or be incapable of doing so, § 352.30(d) both prevents the financially capable lodger from diverting public funds from those who are truly "needy" and requires that the alleged "poor" lodger be examined under the same standards of eligibility and held to the same obligations of repayment as all other applicants and recipients.

To the extent the paying lodger portions of § 352.30(d) provide for income disregards of $15 and $60 (boarding lodgers) monthly, they reflect a state policy which is intended to encourage recipients to take in paying rather than non-paying lodgers.*

B. The Facts

Appellee Hurley

Appellee Hurley receives public assistance for herself and her three children, Doreen, Jamie and John under the AFDC categorical assistance program. Their benefits include a separate shelter allowance pursuant to 18 N.Y.C.R.R. § 352.3(a).

During the approximate period from December 8, 1969 to March 5, 1971, Mrs. Hurley and her children resided

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(footnote continued from preceding page)

concededly eligible child was apparently not resolved. See concurring opinion of App. "I" p. 9. The *Battle* case is now on appeal to the New York Court of Appeals where appellants anticipate that the material issues will be clarified or the case remanded for a new "fair hearing".

* Affidavit and testimony of Linda Harmon before the three-judge court.

in an apartment in Mount Vernon, New York in Westchester County. The apartment consisted of at least a living room, kitchen with dining area, three bedrooms and bath. The actual rent was $150.00 per month. The maximum applicable shelter allowance under the Westchester schedule was $182.00.* With the exception of a four-month period giving rise to the claims herein, Mrs. Hurley and her children received a shelter allowance of $150.00 a month, or the equivalent of the actual rent.

From November of 1970 through February of 1971, ADR, a male friend, resided with Mrs. Hurley and her children. Although it is undisputed that ADR was employed during this four-month period, he did not pay any portion of the rent and did not make any contributions to the Hurleys. However, between November 28, 1967, when the Hurleys received a special grant in the amount of $718.50 for furniture, and September 15, 1970, appellants alleged before the three-judge court that ADR gave the Hurleys numerous gifts.**

Upon verifying to its satisfaction that ADR was residing with the Hurleys and had not paid any portion of the rent, the local agency advised appellee that the total assistance benefits payable to her family would be reduced by $35 monthly for the period of ADR's residence. The local agency's determination was modified at a state "fair hearing" so as to reduce the shelter allowance by $30

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* All county schedules were received in evidence by the three-judge court. The Westchester and Nassau schedules were also submitted to the Second Circuit.

** The gifts are alleged in appellants' Answer and in a caseworker's report of a "home visit" made on September 15, 1970. The pertinent paragraphs of the Answer and case record are reproduced in Appendix "H". Testimony about the September 15, 1970 "home visit" was offered at the evidentiary hearing before the three-judge court and refused. The pertinent paragraphs of the Answer and the caseworker's report were subject to a motion to strike determined in appellees' favor. Both rulings are raised on this appeal.

monthly (⅕ the regular shelter allowance or ⅕ of the rent) referrable to the period from November 1970 through February 1971.

The Hurleys presently reside in upstate New York where they have been continued on the AFDC program. Although Mrs. Hurley no longer has a lodger, she advised the district court that she wished to have a certain male friend (not ADR) reside with her and would do so but for the proration provisions § 352.30(d). Appellants accept her allegations in this regard as true.

Appellee Taylor

Appellee Taylor receives public assistance for herself and her minor child, Margaret, on the AFDC categorical assistance program. Their benefits include a separate shelter allowance.

Appellee and her child share an apartment with appellee's sister, Virginia Taylor, in Freeport, New York, in Nassau County. Their apartment consists of a living room, kitchen, one bedroom, and bath. The actual rent for the apartment (through May 31, 1974) was $180 for a month. The maximum local shelter allowance for an apartment of 3-4 rooms accommodating three people is $165 monthly.

Prior to January 1973, appellee's sister Virginia Taylor was a recipient of public assistance on the Home Relief program. The rent was apportioned between the monthly shelter allowance payable to appellee Taylor and her child and the monthly shelter allowance payable to Virginia Taylor up to the local maximum as follows: ⅔ of $165, or $110 for appellee and her child and ⅓ of $165, or $55 for Virginia Taylor.

In January 1973, Virginia Taylor's Home Relief was discontinued because of a determination of ineligibility by the local agency. This determination was not appealed in a state "fair hearing" and was not challenged below.

During the ensuing two-month period, appellee Taylor continued to receive a shelter allowance equal to ⅔ of the local maximum because Virginia Taylor was a non-paying lodger within the meaning of § 352.30(d) during the relevant period.

Effective March 14, 1973, Virginia Taylor was restored to public assistance on the Aid to the Disabled program. On or about January 1, 1974, her case was transferred to the federal SSI program. Under both programs, Virginia Taylor has received a shelter allowance or its equivalent. Appellee Taylor does not allege that her sister has failed to pay her pro-rata portion of the rent at any time following her restoration to public assistance or that her sister is in any jeopardy with respect to her continuation on the federal SSI program.

Appellee Otey

Appellee Otey receives public assistance for herself and her minor child Kevin under the AFDC categorical Assistance program. Their benefits included a separate shelter allowance.

At all times relevant herein, appellee Otey resided with Kevin in Freeport, New York, in Nassau County. The apartment has a living room, kitchen, two bedrooms and bath. The rent is $145 monthly. The local maximum for an apartment of 2-4 rooms accommodating 2 people is $145.00.

On or about October 1, 1972, Michael Otey, appellee's adult son, age 24, came to reside with appellee and Kevin. Michael remained there until approximately February 1, 1974 when he went on public assistance and left to reside independently. During his residence with appellee, Michael Otey held occasional jobs. However, he did not pay any portion of the rent or make any contributions to appellee or Kevin.

On or about October 26, 1972, appellee Otey was advised by the local public agency that the shelter allowance she and Kevin had been receiving would be reduced by ⅓ pursuant to § 352.30(d) to reflect Michael's living in the household. This reduction became effective February 1, 1973 upon appellee's failure to appear at a state "fair hearing" she had requested. The shelter allowance was restored to $145.00 monthly when Michael demonstrated his separate eligibility for public assistance and left to reside independently.

Applicants for Intervention

Phyllis D'Alessio, Loretta Clark and Francesca Aloise applied for intervention during the course of the proceedings below on behalf of themselves and their minor children. The facts alleged in support of their applications closely paralleled those alleged by the named plaintiffs, appellees herein. See opinion of the single district judge in *Hurley* v. *Lavine,* App. "C" pp. 66a-68a. However, applicant for intervention Phyllis D'Alessio, testified on behalf of appellees at the evidentiary hearing before the three-judge district court and the facts in support of her claims are treated at some length in the three-judge court opinions. Accordingly, they are briefly reviewed below:

Phyllis D'Alessio

Mrs. D'Alessio is a recipient of public assistance on the AFDC program on behalf of herself and her two minor children, Cathy Lenore and Marie.

The D'Alessios reside in an apartment in Mount Vernon, New York in Westchester County. The apartment consists of the following rooms with the approximate dimensions indicated: living room (12′ x 14′); master bedroom (12′ x 15′); girls' bedroom (10′ x 8′); kitchen (10′ x 13′); bath and an additional room (5′ x 6′) in which Mrs. D'Alessio keeps a refrigerator. The rent is $175 per month and the D'Alessios receive a shelter allowance in that amount.

On or before January 1, 1973, H.M., a male friend, came to live with the D'Alessios. H.M. has had occasional employment and has also received unemployment compensation. However, he has not paid any portion of the rent or made any contributions to the D'Alessios since January 1, 1973.*

Mrs. D'Alessio contends that both H.M. and she have been ill from time to time and that they assist each other with the children and household chores.

After verifying that H.M. was living with the D'Alessios and his failure to pay any portion of the rent, the local social services agency advised Mrs. D'Alessio in January, 1973 that the public assistance shelter allowance would be reduced by ¼ ($43.60) from March 1, 1973 forward to reflect H.M.'s pro-rata share. No state "fair hearing" was requested.

During the course of the evidentiary hearing before the three-judge court on June 26, 1974, Mrs. D'Alessio was asked why she had not asked H.M. to contribute his share of the rent. She answered:

> This man [H.M.] has just come out of the Veteran's Hospital after three weeks of hospitalization, and he is not fit for work right now due to extreme high blood pressure, hypertension, and his only way of work is a golf course, and he is not going to go out on the golf course and have a stroke so that he can pay $43 a month rent. [*]

Mrs. D'Alessio offered no other explanation at the hearing for her failure to request H.M. to pay his portion of the

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* H.M. gave Mrs. D'Alessio a bedroom set and a china cabinet in 1970 and apparently has resided with the family for intermittent periods since 1966.

[*] The transcript of the proceedings of June 26, 1974 will be transmitted to this Court with record.

rent from January 1, 1973 (the date the local agency claims H.M. started to reside permanently with the D'Alessio's) or October 4, 1973 (the approximate date Mrs. D'Alessio conceded at the hearing that H.M. came to reside with her on a permanent basis) and June 5, 1974 (three weeks prior to the hearing date and thus prior to the period of H.M.'s hospitalization as stated by Mrs. D'Alessio).* Mrs. D'Alessio testified further that H.M. was fully aware of the availability of public assistance but had refused to apply on his behalf.**

The shelter allowances of the named appellees and the applicants for intervention (except Frances Aloise) have been continued without pro-ration *pendente lite* pursuant to the undertaking of appellants' attorney before the single district judge in *Hurley* v. *Van Lare* (App. "C" pp. 66a-68a).***

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* In an affidavit received by the single district judge in *Hurley* v. *Van Lare*, sworn to February 6, 1973, Mrs. D'Alessio claimed that H.M. was then unable to work because of "prostate infection", "penolitis cyst" and "stomach problems". She stated further that H.M.'s occasional employment had included "various jobs, such as a truck driver's helper, locker room attendant and golf caddy".

** Loretta Clark and Francesa Aloise are the two other applicants for intervention. Mrs. Clark lives in Buffalo, New York and is a recipient of AFDC on behalf of herself and her five minor children. Mrs. Clark's non-paying lodger is a male friend who has lived with the Clarks since at least December 6, 1972. Mrs. Aloise lives in New York City and receives AFDC for herself and her minor child Mario. Mrs. Aloise's non-paying lodger is her adult son Carmine. Carmine has lived with his mother since her least November 12, 1973. He has been continuously employed but has refused to pay any portion of the rent.

*** The undertaking remains applicable only to Mrs. D'Alessio and Mrs. Clark since they are the only original claimants who still have non-paying lodgers residing with them. Mrs. Aloise's application to intervene was not made until the hearing before the three-judge court on June 26, 1971. Appellants made no undertaking with respect to the continuation of the shelter allowance there in issue without pro-ration.

C. Proceedings Prior to Remand

Hurley v. *Van Lare* and *Taylor* v. *Lavine* were commenced as separate civil rights actions for injunctive and declaratory relief and damages in the form of retroactive public assistance benefits. Jurisdiction was alleged under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Hurley was commenced in the United States District Court for the Southern District of New York on or about August 11, 1972 and assigned to the Hon. Arnold Bauman.* An amended complaint was filed on or about September 1, 1972. *Taylor* was commenced in the Eastern District on or about May 16, 1973 and assigned to the Hon. Jack B. Weinstein.

Both cases challenged 18 N.Y.C.R.R. § 352.30(d) as inconsistent with the Social Security Act and unconstitutional.** In support of their claims under Social Security Act, appellees argued that the pro-ration of shelter allowances upon a finding that a non-paying lodger was living in the household established a conclusive presumption of contribution by the lodger to the public assistance family in violation of 42 U.S.C. § 602(a)(10) (App. "G" p. 88a) and 45 C.F.R. § 233.90(a) (App. "G" pp. 89a-90a). In support of their constitutional claims, appellees argued that the conclusive presumption of contribution previously asserted in support of the Social Security Act claims violated the recipients' rights to due process of law; that the classification established by the regulation between recipients who live with non-paying lodgers and those who live without lodgers violated the former recipients' rights to equal protection of the laws; and that any reduction in recipi-

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* District Judge Bauman resigned from the bench since the conclusion of the proceedings below.

** The Taylor action did not raise any claims against § 352.31(a)(3)(iv). As noted at p. *ante*, this section has been treated as largely superfluous throughout, and the basis for any discrimination claim has been removed by recent amendment.

ents' shelter allowances which followed from findings that lodgers are living in their households violated the recipients' rights to privacy and free association.

The *Hurley* action was heard first by District Judge Bauman on appellees' motions for summary judgment in their favor on both the Social Security Act ("pendent") claims and the constitutional claims and on appellants' motion to dismiss the complaint for want of substantiality of the constitutional claims and in the alternative for summary judgment in their favor on the pendent claims. Judge Bauman determined that appellee's due process claim was substantial enough to vest the court with subject matter jurisdiction and then proceeded to the disposition of the pendent claims in preference to recommending the commencing of a three-judge court. *Hagans* v. *Wyman*, —— U.S. ——, 42 U.S.L.W. 4381 (March 25, 1974); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). Judge Bauman agreed with appellees, reading § 352.30(d) and § 352.32(a)(3)(iv) as man-in-the-house rules which "conclusively presume that the lodger is contributing to the [public assistance] family's income" (App. "G" p. 63a) and rejecting appellants' argument that the "regulations merely pro rate the rent among eligible persons and compute the shelter allowance accordingly, leaving the lodger non-eligible to pay his own way." App. "C" p. 64a. Judge Bauman also granted class action status (App. "C" pp. 55a-58a),* refused damages in the

* Judge Bauman originally defined the class as "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(d)." App. "C" p. 56. However, on or about December 18, 1973, Judge Bauman signed an Amended Judgment and Order at the request of appellants and with the consent of appellees which defined the class as follows: "All residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who

(footnote continued on following page)

form of retroactive public assistance payments (App. "C" pp. 68a-71a), and refused the applications for intervention by Mrs. D'Alessio and Mrs. Clark (App. "C" pp. 66a-68a).

Several days after Judge Bauman's opinion in *Hurley*, Judge Weinstein issued his memorandum and order in *Taylor* adopting Judge Bauman's reasoning in relevant part (App. "D").*

On appeal to the Second Circuit, the actions were consolidated, and the decisions of Judge Bauman and Judge Weinstein on the pendent claims reversed. *Taylor* v. *Lavine*, (HAYS, C.J. with FRIENDLY, C.J. for the majority, App. "B" pp. 26a-38a, and OAKES, C.J. dissenting, App. "B" pp. 39a-53a).

Writing for the Second Circuit majority, Circuit Judge Hays recognized both the economies of scale which occur when the number of persons in a given household expands while the rent remains constant and the appropriateness of separating the needs of the public assistance family from those of the non-recipient lodger. He stated in part (App. "B" pp. 36a, 37a, 38a):

> Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC eligible family members from the needs of the persons

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may be threatened with reduction, termination, suspension or denial of public assistance solely because of the presence of a non-contributing lodger in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d).

* No class action was specifically defined in *Taylor*, and it appears that Judge Weinstein believed that the *Taylor* plaintiffs and those similarly situated were subsumed in the definition of the *Hurley* class. App. "D" p. 78a.

who have not demonstrated their eligibility for public assistance.

* * *

Prorating housing expenses among recipients and non-recipients of public aid accounts for economies of scale that are realized when individuals live in groups; per individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.

* * *

The New York regulations have more limited objectives than those held invalid in *King* and *Lewis*. The objective of section 352.30(d) is to insure that all of the beneficiaries of the AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families housing non-eligible persons in their households. They merely prevent non-eligible persons from benefitting from free living space. New York's interest in preventing non-eligible persons from sharing in AFDC benefits is coextensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals." [Footnotes omitted.]

In his dissent, Circuit Judge Oakes appears to consider both the entire residence and the entire shelter allowance the property of the dependent child and caretaker relative

regardless of how many additional persons in fact share that residence. He therefore concludes that the pro-ration of a shelter allowance under § 352.30(d) "withholds benefits from those rightfully entitled" rather than preventing public assistance subsidies of the shelter needs of the lodgers, App. "B" p. 47a. Although acknowledging that the State cannot and should not be required to extend AFDC benefits to ineligible persons, Judge Oakes does not address himself to the question of how such benefits can be avoided without separating recipients' shelter needs from those of non-recipient lodgers except to suggest that the State and local districts pay the entire allowed rent for the shelter and bring what appellants take to be monthly actions against the lodgers to recover their proportionate shares of the rent (App. "B", pp. 47a-50a).

As a result of the Second Circuit decision on the pendent claims, the actions were remanded to a three-judge district court to hear and determine the due process, equal protection and privacy claims raised by appellees. App. "B" p. 29a.

A Petition for Rehearing suggesting that the actions be heard *en banc* was denied by the Second Circuit on June 18, 1974. On or about August 2, 1974, a Petition for a Writ of Certiorari to review the Second Circuit decision was filed in this Court and is awaiting disposition. *Taylor* v. *Lavine* (Doc. No. 74-5054). A Supplement to the Petition was filed on or about August 25, 1974 describing the disposition on remand.

D. Proceedings Upon Remand

On June 26, 1974, the constitutional claims were heard by a three-judge court consisting of District Judges Bauman and Weinstein, the convening judges in *Hurley* and *Taylor* respectively, and Circuit Judge Hays, the author of the Second Circuit majority opinion in the pendent claims. Pursuant to Judge Weinstein's suggestion, an evidentiary hearing was held.

The majority of the district court (per WEINSTEIN, D.J.) sustained appellees' due process claims against 18 N.Y.C. R.R. § 352.30(d). App. "A" pp. 2a-20a. Circuit Judge Hays dissented in conformity with the views expressed in his earlier opinion. App. "A" pp. 20a-23a.

Although recognizing that § 352.30(d) both assists in determining a recipient's actual needs and allocates scarce public assistance funds where they are most necessary (App. "B" pp. 5a, 19a), the district court majority nonetheless found that two "irrebuttable presumptions" inhered in the regulation which offended due process because they were not "necessarily" or "universally true in fact", *Vlandis* v. *Kline*, 412 U.S. 441, 452, (1973). The presumptions alleged are first, that the public assistance family with a non-paying lodger needs less space for its own use than it has and thus its shelter requirements can be met by a smaller shelter allowance;* and, second that the public assistance family with a non-paying lodger "somehow needs less money to pay its share of the rent." App. "A" p. 5a. The majority then found that the due process violations could be cured by making the presumptions "rebuttable" at a state "fair hearing" offered to the recipient wherein individual circumstances could be considered. Among the factors suggested for consideration at such hearings are whether a reduction in the shelter allowance will adversely affect any dependent children, the lodger's social role in the household, the lodger's capacity and willingness to contribute towards the rent and whether the lodger's presence in fact diminishes the recipient's shelter needs. App. "A" pp. 5a-6a, 16a.

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* Notwithstanding Judge Weinstein's characterization of this "presumption" as one relied upon by the State (App. "A" p. 12a), the State never offered any theory in support of § 352.30(d) which purported to assess whether the public assistance families with lodgers had more space than families without lodgers or more space than they needed. See opinion of OAKES, C.J., App. "B" p. 44a. The theory apparently derives from a comment by Judge Hays in his Second Circuit opinion. App. "B" p. 37a.

The majority found it unnecessary to articulate a separate equal protection ground of decision at least as to the non-paying lodger portions of § 352.30(d). App. "A" p. 19a. However, the decision characterizes the $15 and $60 (boarding lodger) income disregards for recipients with paying lodgers as "anomalous" (App. "A" pp. 17a-18a), and the Judgment and Order of August 15, 1974, apparently referring to that portion of the opinion, defines the class to include recipients with paying as well as non-paying lodgers and provides for declaratory and injunctive relief against § 352.30(d) in its entirety. App. "E". Appellees' claims of violation of their rights of free association and privacy were rejected as was the speculative sex discrimination claim. App. "A" pp. 18a-19a.

In his dissent, Circuit Judge Hays notes that the majority's failure to afford controlling significance to the Second Circuit decision in *Taylor* v. *Lavine* effectively finds that the Court of Appeals has unconstitutionally applied § 406(a) of the Social Security Act, 42 U.S.C. § 606a, defining dependent children under the AFDC program. App. "A" p. 23a, n 1. See also 42 U.S.C. 602(a)(10) requiring that AFDC "be furnished with reasonable promptness to all eligible individuals" (App. "G" p. 88a) and necessarily only to such individuals.

Judge Hays then again rejects the application of an "irrebuttable presumption" theory (App. "A" pp. 20a, 21a, 22a):

> The challenged regulation . . . is not unconstitutional. It sets up no "irrebuttable presumption . . . not necessarily or universally true in fact." *Vlander* v. *Kline*, 412 U.S. 441, 452 (1973).
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> [The Second Circuit in *Taylor* v. *Lavine*] reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that

AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups[.]

* * *

If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish separate eligibility for public assistance . . . . Should the lodger establish his eligibility, it is admitted by all parties that a household like the Mrs. D'Alessio-Mr. M household would receive a shelter allowance increased over the amount received by the D'Alessio household alone [*].

Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society; that he is able to pay his own way until and unless he demonstrates the contrary. If a lodger is eligible for public assistance but does not apply, his silence cannot

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[*] Under the New York shelter allowance program, shelter allowances increase in approximate proportion to the number of rooms needed to accommodate the recipients or in proportion to the number of recipients in a given household. Thus, if Mr. M. became an applicant or recipient, the D'Alessio-M. household would be able to obtain either a shelter allowance for an apartment with enough rooms to accommodate the D'Alessios and Mr. M. or a shelter allowance based on the number of applicants and recipients within the household.

> be put at the state's door. If the lodger is too proud to accept welfare—Mrs. [D'Alessio's] testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A non-contributing lodger like Mr. M has and eats his public assistance cake without demonstrating his need.

With respect to the majority's choice of a "fair hearing" offered to the recipient as vehicle for rebutting the "presumptions", Judge Hays commented in part (App. "A" p. 22a)

> The majority states that the aid recipient's "Fair Hearing" . . . is a "reasonable alternative means" for determining the amount a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of fact-finding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.

Judge Hays concluded in part (App. "A" p. 23a):

> [Section 352.30(d)] does not necessarily upset the established patterns of cooperation between people of limited and uncertain means. So long as each member of a group cooperating as a household establishes his eligibility for public funds, cooperating will increase the shelter allowance due the whole. In any event, the procedure implicitly sanctioned by the majority, requiring the lodger to submit his affairs to the New York State Social Services Department in the context

of the AFDC recipient's "Fair Hearing", is surely no less conducive to "familial disintegration" than requiring the lodger to demonstrate his need on his own application.

While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid.

• • •

It prefers lodgers in AFDC households over the eligible AFDC recipients themselves since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of identifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

On September 12, 1974, appellants filed an application in this Court for a stay of the Judgment and Order of the district court pending the disposition of this appeal (Application No. 161). The application to the three-judge court for a stay was denied on August 15, 1974.

It is anticipated that the Brief in Opposition to the Petition for Certiorari to review the Second Circuit opinion in *Taylor* v. *Lavine*, (Doc. No. 74-5054) will be filed with this Jurisdictional Statement.

Argument

The district court majority opinion, if upheld, requires the State of New York and its local social services districts to provide rental subsidies for non-paying lodgers without any showing that those lodgers are in fact eligible for pub-

lic assistance. The cost of the program is estimated in excess of $2,000,000 annually (appellants' stay application, filed September 12, 1974, pp. 20-21). Funding could only be obtained through new appropriations or by reducing the standard of assistance now available to recipients of demonstrated need.

In contrast, the statewide plan invalidated by the majority fairly apportioned the cost of shelter among all individuals living in a common household and assured that the shelter needs of public assistance recipients living there would be met from public assistance funds while excluding those of non-paying, non-recipient lodgers. This plan was sustained by a majority of the Second Circuit.

The position of the district court majority follows from the erroneous application of the doctrine of irrebuttable presumptions and the concomitant requirement of a finding of "no alternative means" with respect to a classifying regulation properly considered under a traditional equal protection test. The majority's reasoning in this regard reflects a serious misapprehension of the relevant decisions of this Court and should be corrected to conform with the Second Circuit decision in *Taylor* v. *Lavine* (Doc. No. 74-5054).

A. The pro-ration of shelter cost among all persons living in a common household and the exclusion of the non-paying lodger's share from shelter allowance payments pursuant to 18 N.Y.C.R.R. § 352.30(d) do not raise any irrebuttable presumption in violation of the recipient's rights to due process of law.

None of the opinions below disputes the power of the Commissioner of the New York State Department of Social Services to promulgate general rules excluding non-recipients from shelter allowance payments. Section 352.30 (d) performs exactly this function when recipients and non-recipients, herein non-paying lodgers, live in common households. As the Second Circuit held, the regulation is

completely consistent with the statutes and regulations governing the AFDC program which require that public assistance be paid to meet the needs of dependent children and, if necessary, those of the caretaker relatives with whom they reside. 42 U.S.C. §§ 601, 606(a), (b) (App. "G" pp. 87a-89a). The obligation of the State and local agencies to furnish aid to "all eligible individuals," 42 U.S.C. § 602(a)(10) (App. "G" p. 88a) necessarily means that payments must be made to those individuals who have demonstrated eligibility in conformity with the state plan and only to them, i.e. to the caretaker relative and dependant a child and not to the caretaker, child and "lodger".* Social Services Law §§ 131, 131-a, subds. 1 and 2, 343, 344, 349, 350 (App. "G" pp. 90a-93a); Second Circuit majority opinion, App. "B" p. 38a.

Considering the non-paying lodger provisions of § 352.30 (d) in a due process rather than a statutory context does not change the purpose or effect of the regulation and cannot, appellants submit, produce a different legal result.

This Court's recent decisions invalidating legislation that established "permanent" or long term classifications on the basis of unwarranted factual inferences or "irrebuttably presumed" facts are not authority to the contrary. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974) (physical incapacity to teach irrebuttably presumed from fact of pregnancy); *Vlandis* v. *Kline,* 412 U.S. 441

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* Federal AFDC legislation authorizes the states to provide public assistance to certain persons other than dependent children and caretaker relatives who are considered essential to welfare of the recipients. 42 U.S.C. §§ 602(a)(7), 606(b) (App. "G" pp. 87a-88a, 88a-89a). New York has opted to participate in this extension of the AFDC program. Social Services Law § 350; 18 N.Y.C.R.R. § 352.7(f). No claim was made below that any of the "lodgers" were essential persons within the meaning of the federal and state legislation. Moreover, an essential person must establish separate eligibility for public assistance on the basis of his own income and resources. 18 N.Y.C.R.R. § 352.7(f).

(1973) (non-residency during state university enrollment irrebuttably presumed for married students whose legal address was outside state at the time of application for admission and for single students whose legal address was outside the state at some point during the year preceding admission); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (lack of need for food stamps irrebuttably presumed from family's tax exemption taken in preceding year); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (unfitness for custody of natural child irrebuttably presumed from status as unwed father). See district court majority opinion, App. "A" pp. 11a-12a.

Since the non-paying lodger may change his status to paying lodger or to recipient if he demonstrates his need, § 352.30(d) cannot be read as assigning "permanent" or long term status. Further, § 352.30(d) does not rely on any inferred, "presumed" or unproven facts. All that is necessary or appropriate to support the operation of the regulation are findings that a "non-responsible relative" or "unrelated person" is living with one or more recipients; that the "relative" or "person" has failed to demonstrate his eligibility for public assistance; and that he has failed to pay his fractional share of the rent.* Once these findings are made, the lodger is established as a non-recipient and his shelter needs can be properly excluded from the public assistance budget. If the circumstances are illustrated in terms of an alleged "presumption," the "basic" or proven facts of the lodger's residence and non-eligibility are the same as the inferred or "presumed" facts necessary to support the operation of the regulation. As is apparent, the illustration leaves

* In order to give full effect to the pro-ration provisions, it is, of course, necessary to determine the total number of persons living in the household, the number of public assistance recipients, and the amount of the shelter allowance. See p. 10, *ante*. All of the findings are based on investigation by the local agency and are subject to review at a state "fair hearing."

open only one viable conclusion, that § 352.30(d) establishes no "presumption" at all with respect to non-paying lodgers, much less an "irrebuttable" one.

The majority's reliance on "presumptions" follows from its refusal to distinguish, or separate, the shelter needs of the lodger from those of the public assistance family. Thus, Judge Weinstein erroneously defines the shelter needs of the public assistance family in terms of the allowed rent for an entire apartment regardless of how many additional persons or "lodgers" also live there and finds, as a concomitant, that any reduction in the shelter allowance "presumes" that the lodger is contributing to the shelter needs of the recipient family. District court majority opinion, App. "A" pp. 15a-17a. However, correctly viewed, shelter is the shared need of all persons living in a common household, recipient and lodger alike, and each person's share is properly expressed as a fraction of the actual or allowed rent. The shares equal to the number of persons in the public assistance family can then be separated and paid from public funds and the lodger's share excluded.* In this manner the actual needs of the public assistance family are determined on the basis of actual changes in living arrangements occasioned by the arrival of the lodger. The fact that the shelter allowance is "reduced" merely reflects the fact the public assistance family's shelter needs had been budgeted prior to the lodger's arrival and therefore without regard to his share. Had the lodger joined the family prior to their application for assistance, the family's shelter needs would have been budgeted initially in proportion to

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* Pro-ration and separability may be illustrated in operational terms as follows. While Mrs. D'Alessio and her two daughters occupied the entire two bedroom apartment, their shelter needs were equivalent to the 3/3 of the rent. When Mr. M. moved in, adding another share, the D'Alessios' shelter needs became the equivalent of 3/4 of the rent, and Mr. M.'s shelter needs became the equivalent of 1/4 of the rent. Pursuant to § 352.30(d), the D'Alessios' shelter needs were then separated from Mr. M.'s shelter needs and only the D'Alessios' needs met with public assistance funds.

their numbers in the household, and no reduction would have taken place. For example, appellee Taylor and her minor child received a shelter allowance of ⅔ of the allowed rent both before and after the application of § 352.30(d) because appellee's sister Virginia Taylor shared the apartment during the entire period.

The separability of the shelter needs of the recipients from those of the non-recipient is well established. 42 U.S.C. § 606(c) (describing the situation where the recipient caretaker relative and dependent child live with other relatives and evidently contemplating aid only to the caretaker and child) (App. "G" p. 89a); Simplified Methods For Determining Needs, Method III; Social Services Law §§ 131, 131-a, 343 (providing for assistance to recipients of demonstrated need regardless of whether they live alone, with other recipients, or with non-recipients) (App "G" pp. 90a-92a); *Gilliard* v. *Craig*, 331 F. Supp. 587 (W.D.N.C.), *aff'd.* 409 U.S. 807 (1972) (allowing exclusion of ineligible child's needs from budget of public assistance family with whom he lived); *Boucher* v. *Minter*, 349 F. Supp. *supra* at 1244 (noting that needs of mother who became ineligible after remarriage because of her husband's legal obligation to support her were separable from needs of stepchildren who continued to be eligible in the absence of a general legal obligation requiring stepfathers to support stepchildren); *Dullea* v. *Ott*, 316 F. Supp. 1273 (D. Mass. 1970) (sustaining automatic budgeting reclassification to category in which recipients shared living arrangements with non-recipients and only the recipients' shares were reimbursed); Second Circuit majority opinion, App "B" p. 36a; district court dissenting opinion, App "A", p. 21a.

To refuse to accept the separability of the shelter needs of the public assistance family from those of the lodger provides the lodger with a public subsidy in the form of free shelter. At no point in its opinion does the district court majority explain how the State and local agencies

can be required to pay this subsidy in face of the lodger's conceded failure to demonstrate his eligibility for public assistance. Moreover, the acceptance of the majority's theory makes the grant of a shelter allowance turn on a determination of whether the residence "belongs to" the public assistance family who has chosen to invite a non-recipient lodger to live with them or "belongs to" a non-recipient who has invited a public assistance family to live with him. In the former instance, the public assistance family would receive a shelter allowance for the entire residence since their shelter needs allegedly do not change because of the addition of the lodger and cannot be separated from those of the lodger. In the latter, the public assistance family would receive no shelter allowance since the non-recipient's shelter needs would not change because of the addition of the family and could not be separated from those of the family. Under the program invalidated by the court, the recipients obtain their share of shelter cost regardless of whether they choose to live with a non-recipient or a non-recipient lives with them. 18 N.Y.C.R.R. §§ 352.3(c) and 352.30(d).

Even if the non-paying lodger portions of § 352.30(d) are considered as raising certain presumptions, the regulation is nonetheless valid. The distinction between recipients and non-recipient lodgers rests on the "necessarily" and "universally true" fact that the recipients have demonstrated their eligibility for public assistance whereas the non-recipient lodgers have not. *Cleveland Board of Education* v. *LaFluer*, 414 U.S. *supra* at 644 quoting *Vlandis* v. *Kline*, 412 U.S. *supra* at 452. Moreover, any presumption that the lodger is self-sustaining or "paying his own way" is the same presumption that attaches to all members of society who are not participants in the public assistance program and is "rebuttable" by the simple act of applying to the local social services agency for aid. District court dissenting opinion, App. "A" p. 22a.

This Court's decisions in *King* v. *Smith,* 392 U.S. 309 (1970) and *Lewis* v. *Martin,* 397 U.S. 552 (1970) and the summary affirmances in *Gaither* v. *Sterret,* 346 F. Supp. 1095 [N.D. Ind.] *aff'd* 409 U.S. 1070 (1972), *X* v. *McCorkle,* 333 F. Supp. 1109 (N.D. N.J. 1970) *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 73 (1971) and *Solmon* v. *Shapiro,* 300 F. Supp. 403 (D. Conn.), aff'd 396 U.S. 5 (1969) are entirely consistent with appellants' position in the cases at bar.

In each of the foregoing cases, the needs of a concededly eligible family were either completely or partially excluded from consideration for public assistance by reason of a non-recipient in the household. In reaching this result, the statutes and regulations deemed the non-recipient to be responsible for the public assistance family's support when in fact he was not. Section 352.30(d) makes no such artificial assumptions about the non-paying lodger. It does not charge the lodger with the cost of the family's support but rather, in distinguishing between the lodger's needs and the family's needs, avoids charging the family and public funds with the non-recipient lodger's support.

B. 18 N.Y.C.R.R. § 352.30(d) does not violate recipients' rights to equal protection of the laws in distinguishing between recipients who live without lodgers and those who live with either non-paying lodgers or paying lodgers.

Appellees' equal protection claim throughout the proceedings below was limited to the alleged irrationality between pro-rating the shelter allowances of recipients who live with non-paying lodgers while leaving the shelter allowances of recipients who live without lodgers unaffected. District court majority opinion, App. "A" p. 19a. However, the district court majority did consider the rationality of the paying lodger and related income disregard

portions of § 352.30(d) as well.* District court majority opinion, App. "A" p. 17a-18a. Accordingly appellants consider both the non-paying and paying lodger classifications established by § 352.30(d) and submit that both are valid under the Equal Protection Clause.

It is beyond cavil that the traditional equal protection test of "reasonable relation to a legitimate state interest" is appropriate to both the non-paying and paying lodger portions of § 352.30(d). *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). See also *Kahn* v. *Shevin*, —— U.S. ——, 42 U.S.L.W. 4591, 4593 (April 24, 1974) (approving the application of the "reasonable relation" test to classifications which "discriminate" in favor of a particular groups as do the income disregards herein).

In support of the non-paying lodger portions of § 352.30(d), appellants contended that the State had a legitimate interest in refusing to meet the shelter needs of the non-paying lodger who has not demonstrated his eligibility for public assistance. See pp. 10-11, *ante*. The district court majority accepted appellants' position on this point. "The purported objective of this distinction [between recipients without lodgers and recipients with non-paying lodgers] is a constitutionally appropriate one since . . . New York may seek to allocate its scarce welfare resources where they are most needed." App. "A" p. 19a.

The related question of whether a uniform rule of general application like § 352.30(d) is a reasonable means of achieving this legitimate objective must also be answered in the affirmative. As discussed in Point A above, the proration of the shelter allowance both reflects the actual

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* The propriety of the district court's consideration of the paying lodger portions of § 352.30(d), its inclusion of recipients with paying lodgers in the class and its award of relief to them are considered at Point "E", *infra*.

changes in the shelter needs of the public assistance family caused by the addition of another person to the household and excludes that share of shelter cost which the State and local agencies cannot be required to reimburse by reason of the lodger's failure to demonstrate his eligibility for assistance.

The majority's refusal to acknowledge the pro-ration procedure as reasonable is, as is its reliance on presumptions, attributable to its failure to recognize shelter needs as shared and the various shares as separable. As a result, the majority finds that "an alternative means", consisting of individualized determination assessing recipients' needs, must be used when a non-paying lodger is present. App. "A", pp. 15a-17a, 19a.

The alleged requirement of "individualized determinations" of need is both legally unsound and illusory. The legal obligation imposed on the State and local agencies to proceed by "less drastic" "alternative means" would be arguably appropriate if the compelling state interest test were applicable. Since only the "reasonable relation" is applicable to § 352.30(d), the effect of the ruling below is to create a different result by resort to "presumptions" than could be obtained under appropriate legal analysis under the Equal Protection Clause. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. *supra* at 652-653, 656-657, 657-660 (POWELL, J. concurring and REHNQUIST, J. dissenting with BURGER, C.J.). On a practical level, the majority directs that the individualized determinations be made at "fair hearings" offered to the recipients. Although all the factors to be considered at such hearings do not clearly appear from the opinion (App. "A" pp. 5a-6a, 16a and p. 23, *ante.*). Chief among them is a determination of whether or not the presence of the lodger does *in fact* diminish the family's shelter needs. (App. "A" p. 16a, Emphasis original). Since, as noted, the shelter program now recognizes that needs of the public assistance family "diminish" when

the lodger is added to the household, the result would be the same after individualized hearings as it is now under the § 352.30(d). To accept the alternative arguments that the family's needs would not be "diminished" unless the lodger is willing to pay his share of the rent is, of course, to have the family meet the lodger's needs, not their own. If the lodger is "truly needy," then his appropriate course of action is to make application on his own behalf, not to obtain his benefits through a "fair hearing" offered to a recipient. On his application, the local agency would obtain information necessary to determine initial and continuing eligibility and to enforce the lodger's obligation to repay the public funds advanced to him should he become able to do so. See e.g., *Snell* v. *Wyman,* 281 F. Supp. 853, (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969). As Judge Hays recognized, the lodger's failure to seek aid on his own behalf cannot be "put at the State's door" or obviated by attributing his needs to the public assistance family. App. "A" p. 22a.

The paying lodger portions of § 352.30(d) present two questions: first, whether the State and local agencies may treat actual contributions made by the lodger to the public assistance family as income to the family thus reducing the family's needs by the amount of the contributions; and second, whether the State and local agencies may encourage recipients to take in paying or "contributing" lodgers by disregarding a portion of the lodger's contribution in determining the family's needs.

The first question must be answered with the affirmative because the contributions are unquestionably income or a resource of the recipient family and may therefore be set-off against need. This practice has been endorsed by this Court in *King* v. *Smith, supra,* and *Lewis* v. *Martin, supra,* and by HEW, 45 C.F.R. 233.90(A) (App. "G", p. 89a). Indeed, appellees repeatedly stated below that if the State and local agencies had merely sought to reduce

shelter allowances on the basis of the actual contributions of lodgers, they would have no claim.

The second question must likewise be answered in the affirmative since the income disregards of $15 and $60 (boarding lodgers) monthly simply reflect a slight modification of the set-off procedure in favor of the recipient for the purpose of encouraging paying or "contributing" lodgers rather than non-paying lodgers. See p. 11, *ante*.

The state purpose in this regard is not seriously open to question. Insofar as the State has chosen an income disregard procedure and supported that procedure with its own funds, it has selected a reasonable means for achieving this purpose, indeed the same means chosen by the federal government in its grant of certain income exemptions or disregards for employed recipients. See e.g., 42 U.S.C. §§ 609, 630 *et seq.* The amount of the disregards in issue is likewise appropriate. See *Village of Belle Terre* v. *Boraas*, —— U.S. ——, 42 U.S.L.W. 4475, 4477 and n. 5 (April 1, 1974).

Acceptance of the majority's characterization of income disregards as "anomalous" (App. "A", p. 17a) would, of course, require their invalidation regardless of amount and have far ranging implications for current federal and state assistance programs. Further, no proof was offered at the evidentiary hearing to support either the majority's speculation that the income disregards result in monthly "exchanges" of the disregarded amount between the public assistance family and the lodger or its conclusion that the State and local agencies would permit the purpose of the regulation to be frustrated in this manner. See App. "A" pp. 17a-18a.

C. The district court erred in refusing evidence of substantial "contributions" of furnishings made to appellee Hurley by her non-paying lodger. The contributions were relevant to the capacity of the lodger to pay his share of the rent and illustrative of the purposes of § 352.30(d).

Appellants offered the testimony of one of appellee Hurley's caseworkers and documentary evidence showing that appellee Hurley's male lodger, ADR, had made certain gifts to her including wall-to-wall carpeting throughout the three bedroom apartment, an upholstered sofa and arm chairs, a complete bedroom suite, a dinette set and a color console television set. See caseworker's report of "home visit" made on September 15, 1970, App. "H" pp. 97a-99a. Mrs. Hurley must have received these gifts between November 18, 1967, when she received a public assistance grant to purchase furniture which had been largely replaced by the "new" furniture, and September 15, 1970, the date of the "home visit" when the furniture was observed by the caseworker.*

The testimony was excluded after an offer of proof by appellants' counsel and the documentary evidence and pertinent allegations of the Answer were stricken on subsequent motion by appellees. Although the court did not articulate a ground for its rulings, appellants take those rulings as based on the two main points urged by appellees' counsel, lack of relevance and the alleged pendency of appellants' motion for summary judgment which did not refer to the "new furniture" as material facts in dispute.

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* The time can be more closely approximated from the caseworker's report since it appears that the "new furniture" had not been observed in a prior home visit. App. "H" pp. 97a-98a. According to the case file, the prior "home visit" took place between April and July 1, 1969.

As is apparent, there can be only two types of lodgers, those with the financial capacity to pay their share of the rent and those without such capacity. App. "A" p. 22a and discussion *ante*, pp. 10-11. With respect to the former category, § 352.30(d) properly prohibits the diversion of public assistance funds for the benefit of the lodger who refuses to pay the cost of his own shelter, preferring to expend his income on other "needs." The evidence offered to the district court would have shown that ADR was a financially capable lodger who in effect chose to devote substantial resources to Hurley's comfort while also choosing to charge his share of the rent against public funds.

Appellees' objection on the grounds of relevance was principally concerned with the fact that the gifts alleged were not made during the period that the local agency and the state "fair hearing" established that ADR was a non-paying lodger, i.e. from November 1970 through February 1971. While this is true, it does not undercut the relevance of the furniture gifts . As noted, the evidence offered would have established that the gifts were made at a time very close to November 1970, i.e. probably after April 1969 and before September 15, 1970. See discussion above. It is further conceded in the record that ADR was continuously employed during the period of time he was a non-paying lodger, and no change in the nature of his employment was alleged prior to his joining the Hurleys. On the basis of these facts, appellants submit that it was well within the discretion of the district court to conclude that ADR had the financial capacity to pay his pro rata share of the rent during the period that he was a lodger.

Appellees' opposition to the admission of the evidence on the ground that it was not referred to on appellants' motion for summary judgment did not warrant exclusion.

Contrary to the allegations made by appellees, appellants did not have a motion for summary judgment pend-

ing before the three-judge court. The only summary judgment motions by appellants were made on the statutory "pendent" claims before the single district judges in *Hurley* and *Taylor*, not on the constitutional claims. See p. 19, *ante*.* These motions were granted on the Second Circuit appeal. App. "B" pp. 29a, 38a. On remand to the three-judge court, appellants answered and did not move. Thus, the only motion properly before the district court was appellees' motion for summary judgment, not that of appellants.

While appellants agree that the gravaman of the statutory and the constitutional claims was the same and thus that the actions could have been disposed by the three-judge court without further fact finding, an evidentiary hearing was held as the instance of the appellees pursuant to Judge Weinstein's suggestion and notwithstanding their own pending motion for summary judgment. The subject matter of hearing was housing conditions and "living arrangements" among the poor. In this context appellants sought to offer additional facts concerning appellee Hurley's "living arrangements" in relation to the operation of the § 352.30(d). Since those facts were relevant to purpose of the regulation and to the new issues tendered by appellees, they should have been admitted.

D. The district court erred in refusing to dismiss the claims of appellees Taylor and Otey which had become non-justiciable during the course of the proceedings.

The three-judge court was directed to consider whether appellee Taylor's claims had become moot by reason of

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* Appellees moved for the summary judgment in their favor before the single district judges on both the statutory and constitutional claims. Appellants did not make an opposing summary judgment motion on the constitutional claims since these claims, if substantial, had to be referred to a three-judge court. 28 U.S.C. § 2281 *et seq. Goosby* v. *Osser*, 409 U.S. 512 (1973).

Virginia Taylor's restoration to public assistance and her payment of her share of shelter costs from the proceeds of her own grant. Second Circuit majority opinion, App. "B" p. 32a and n. 3. See discussion, *ante* pp. 13-14. Appellee Otey's shelter allowance was restored to the equivalent of the rent when Michael, appellee's adult son and former non-paying lodger, obtained public assistance on his own behalf and left to establish a separate residence. See discussion, *ante* pp. 14-15.

Although apparently accepting appellants' position that the Taylor and Otey claims were no longer justiciable under this Court's decisions in *DeFunis* v. *Odegaard*, —— U.S. ——, 40 L. Ed. 2d 164 (1974); *Hall* v. *Beals*, 396 U.S. 45 (1969) and *Golden* v. *Zwickler*, 394 U.S. 103 (1969), the district court majority nonetheless found that "since the controversy affects many AFDC families and this is a class action, there is no need to decide whether a particular named plaintiff is still being adversely affected by the challenged regulations." App. "A" p. 19a. To the contrary, there was a need to determine the status of the Taylor and Otey claims. As this Court has held, a plaintiff cannot represent a class of which he is not a part. *Bailey* v. *Patterson*, 396 U.S. 31, 32-33 (1962). Accord *Richardson* v. *Ramirez*, —— U.S. ——, 42 L. Ed. 2d 551, 562 (1974). Once the claims of appellees Taylor and Otey were established as non-justiciable, those appellees could no longer be considered as adequate representatives of the class. Proper procedure required that the action proceed in the name of appellee Hurley alone or that appellees Taylor and Otey be substituted with other members of the class who continued to have live grievances. *Gaddis* v. *Wyman*, 304 F. Supp. 713 (S.D.N.Y. 1969).

E. The district court erred in defining the class to include recipients who share households with paying lodgers as will recipients who share households with non-paying lodgers and in invalidating § 352.30(d) in its entirety.*

None of the named appellees shared her household with a paying lodger, and no claim was raised below against the paying lodger portions § 352.30(d). Accordingly no appellee could properly represent a class consisting recipients with paying lodgers, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962), and there was no controversy before the district court as to these severable portions of § 352.30(d). Indeed, it is dubious whether there could be a serious challenge to the paying lodger portions of § 352.30(d). No recipient can claim to be injured by them since any reduction in need is based on actual contributions, and they are obviously consistent with established principles in the administration of public assistance programs. See discussion pp. 37-38 *ante*. As Judge Oakes noted in his Second Circuit dissent (App. "B" p. 43a n. 5):

> This actual contribution [made by the paying lodger under § 352.30(d)], like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide the money necessary to bring a family up to its level of need. This

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* The class definition includes "residents of the State of New York . . . who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be [so] threatened . . . solely because of the presence of a "lodger" in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30 (d) . . . ." Judgement and Order of August 15, 1974, App. "E" p. 82a. The failure to use the qualifying term "non-paying" requires that the definition be read to include "paying" lodgers since recipients "grants" are "reduced," "terminated" or "denied" based on the actual contributions of paying lodgers. The definition of the class on appeal to the Second Circuit used the qualified term "non-paying lodger". See footnote p. 19, *ante*. The Judgment and Order also declares "18 N.Y.C.R.R. §§ 352.31(a)(3)(iv) and 352.30(d)" and enjoins their enforcement. App. "E" pp. 82a-83a.

section of the regulation is challenged and, in my view, comports entirely with the intent of the federal and state regulations.

Thus, by reason of its definition of the class and its invalidation of the regulation in its entirety, the district court majority determined the merits of the paying lodger provisions in the absence of an appropriate plaintiff and a claim, without argument on the merits, and awarded relief against provisions which do not adversely affect any recipient. Its Judgment and Order in this regard should therefore be vacated.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, October 18, 1974.

Respectfully submitted,

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*SHIRLEY TOBY GREITZER, Law Intern, assisted in the preparation of this Jurisdictional Statement.

APPENDIX A

Opinions of the Three-Judge District Court.

UNITED STATES DISTRICT COURTS

FOR SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

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72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

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73 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix A.

APPEARANCES:

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Before HAYS, Circuit Judge, BAUMAN, District Judge, and WEINSTEIN, District Judge.

WEINSTEIN, District Judge:

Plaintiffs complain on behalf of a class of some 10,000 that the New York State regulations automatically reducing

aid to families with dependent children (AFDC) (42 U.S.C. §§ 601-44) if the recipient houses a non-contributing "lodger" are unlawful both on constitutional and statutory grounds. Separate civil rights actions were brought in the Southern and Eastern Districts of New York. 42 U.S.C. § 1983; 28 U.S.C. § 1343(3); Fed. R. Civ. P. 23.

In each action the District Court sustained plaintiffs' statutory claim without considering the constitutional issues. *Hurley* v. *Van Lare,* 365 F. Supp. 186, (S.D.N.Y. 1973); *Taylor* v. *Lavine* (unreported), Slip Op. 73-C-699 (E.D.N.Y. 1973). The Court of Appeals reversed and remanded the cases "for the convening of a three-judge court to consider the constitutional issues. *Taylor* v. *Lavine,* —— F. 2d ——, ——, Slip Op. 73-2731 at p. 3470 (2d Cir. 1974).

The actions have been consolidated for consideration of the constitutional issues by a three-judge court. 28 U.S.C. §§ 2281, 2284. *Cf. Gaddis* v. *Wyman,* 304 F. Supp. 717, 720 (S.D.N.Y. 1969), *aff'd per curiam sub nom. Wyman* v. *Bowens,* 397 U.S. 49, 90 S. Ct. 813 (1970). It is urged that the New York State "lodger" regulations (1) create an irrebuttable presumption offensive to due process; (2) invade rights to privacy and free association; and (3) deny equal protection of the laws. For the reasons set forth below, we conclude that the regulations in question are unconstitutional.

The AFDC program was designed by Congress "to help maintain and strengthen life," and to encourage recipients "to retain . . . personal independence consistent with . . . care and protection" of dependent children. 42 U.S.C. § 601. As enforced, the state regulations are corrosive of these goals. The nation's generous spirit of concern for the poor, with its concomitant desire to equalize the developmental opportunity of a young generation of impoverished, has been thwarted. Unless checked there is a clear tendency in

such regulations as are before us to strip welfare recipients of the last vestiges of their sense of personal worth, to force them, in words used to describe a group existing on the edge of extinction, to "live on as a people without life, without passion, beyond humanity." C. M. Turnbull, THE MOUNTAIN PEOPLE 295 (Simon & Shuster Touchstone ed. 1972).

I. FACTS

A. CHALLENGED REGULATIONS

The federal AFDC program provides states with matching funds to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . .". 42 U.S.C. § 606(a). Among the New York regulations under which AFDC funds are distributed are the two challenged here—18 N.Y.C.R.R. § 352.30(d), which reduces a recipient's shelter allowance if the recipient houses a noncontributing "lodger," and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipent but not married to her as a "lodger." These regulations read:

> "*A non-legally responsible* [for support of the aided persons] relative or unrelated *person* in the household, who is not applying for nor receiving public assistance shall not be included in the budget and *shall be deemed to be a lodger* or boarding lodger. . . . *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance* including fuel for heating, *shall be a pro rata share of the regular shelter allowance.*" 18 N.Y.C.R.R. § 352.30(d). [Emphasis added.]
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> "When a female applicant or recipient is living with a man to whom she is not married . . . his available in-

come and resources shall be applied in accordance with the following:

* * *

"(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)." 18 N.Y.C.R.R. § 352.31(a)(3).

Ostensibly New York enacted 18 N.Y.C.R.R. 352.30(d) pursuant to its duty under the federal AFDC program to determine a recipient's actual need by taking "into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(8). Aimed as it is at preventing state welfare funds from going where they are not needed, the regulation makes two alternative irrebuttable presumptions. First, it presumes that a recipient family able to have a noncontributing lodger needs less housing space for its own use and consequently needs less money to pay for less space. The second alternative presumption is that a recipient family able to house a noncontributing lodger—even if the family could not reasonably subsist in less space—somehow needs less money to pay its share of the rent. Apparently the rationale of this presumption is that the lodger could, should, and therefore would, pay his or her proper share of the rent if forced to by a reduction in the recipient family's shelter allowance, for it assumes—irrebuttably—that, at least if he is a male, a "lodger" has "available income and resources." 18 N.Y.C.R.R. § 352.31(a)(3)(iv).

Under the regulations no hearing to determine if, or how, a reduction will adversely affect particular dependent minor children can be had. There can be no hearing to decide

whether in any particular case the presumptions are contrary to the facts. Whether the "lodger" be a sister, a child, or adult companion who helps hold the family unit together, whether this "lodger" can or will contribute towards the rent, and whether the "lodger's" presence saves the state money are all undisputable under the regulations.

B. Those Affected by the Regulations

The backgrounds of the named plaintiffs have been sufficiently set forth in prior published opinions. *See* —— F. 2d —— (2d Cir. 1974); 365 F. Supp. 186 (S.D.N.Y. 1973). Local welfare agencies have reduced or are threatening to reduce the shelter allowances of AFDC recipients on the basis of these regulations: Mrs. Hurley and her three children from $150 to $115 because she lived with a man not her husband; Mrs. Taylor and her two children from $165 to $110 because she allowed her incapacitated sister to stay with her; and Mrs. Otey and her minor son from $145 to $96.65 because she allowed an adult unemployed son to sleep in the apartment

Typical of the factual situations which welfare officials must ignore in applying the mechanical regulation is that related by Mrs. D, who testified at the trial. She and her two minor children reside in Mount Vernon in an apartment characterized by Paul Davidoff, a distinguished urban planner, as "far below a modern standard for decent accommodations for a family of that size." They have received AFDC assistance for approximately the last six and one-half years. She has not seen or heard from her husband since July, 1965; when she attempted to obtain a divorce Legal Aid could not go forward with the case, she testified, because she could not afford necessary disbursements. Over the past six years Mrs. D has been hospitalized some dozen times for surgical and other treatment.

Because of her illnesses and periods of convalescence, plaintiff has not been able to carry out many family and household functions; obviously she is not well and seems aged beyond her years.

A male friend of the family has taken up residence in the D household. During Mrs. D's periods of illness and convalescence, he took care of her and her children, shopped for food, washed the family's clothes, cooked the family's meals, cleaned the house and performed other household tasks. He, himself, has various disabilities including extreme high blood pressure and he is presently unable to work. He is under no legal obligation to support the family and, in fact, has provided no financial support. Because of his presence local welfare officials informed Mrs. D:

> "Quality control reports of 1/15/72 indicated that Mr. [M.] resides with you and your family. Therefore, we are prorating your rent ¾ of $175 = $131.40."

The proposed reduction in Mrs. D's public assistance grant would leave the mother and two children with insufficient funds to purchase those necessities of life—food and clothing—requisite for a minimum standard of living.

Whether the state would save money were the male to leave—or himself successfully apply for a welfare grant, as he probably could—is not clear. In view of the mother's health, one of her social workers informed her that she would be entitled to homemaker and other assistance. The effect on the children, who now refer to the man as "daddy," of his leaving certainly cannot be assumed to be beneficial.

Mrs. D's case is illustrative of many situations where a mother on welfare houses a noncontributing adult male companion. The poor do not necessarily cohabit on a bed of

roses. In the D's case the two sickly adults and two young children abandoned by their father live in substandard accommodations and use broken furniture—purchased from a company to which Mrs. D had been steered by a welfare worker; and the children and mother receive a bare subsistence allotment for food and other necessities.

D's case was put in perspective as typical by Professor Herbert Gans of Columbia University, whose work in the sociology of the poor is well known and highly regarded. He described the reason for the prevalence of such arrangements among the poor as follows:

> ". . . Poor people often live a very insecure existence, not only in terms of the amount of money they have, but the uncertainties about how long they will have it. . . .
>
> "So, quite frequently you do get a pattern among poor people, if they can't work or they can't find work either temporarily or permanently, of moving in with a relative, either temporarily or permanently, because there simply isn't any money to establish or to continue to maintain one's own household. And typically, then, the people then become lodgers, help out in the family in various ways in lieu of paying rent, helping to raise the children, taking care of the house, doing a variety of things. I think that's one major explanation.
>
> * * *
>
> "There are poor people who either feel that their poverty is temporary and don't want to go on welfare, don't want to get involved with being on welfare—welfare itself is a full-time job quite often—you know, filling out of the forms, dealing with the regulations, dealing with the social workers and the case workers, and what have you, and so they simply say we are not going to go on welfare and hope perhaps their problem

is temporary. Other people . . . just . . . have the pride of independence, as it is sometimes called, and say they want to make it on their own however that is going to be."

This "doubling up phenomenon among poor people . . . is particularly [prevalent] . . . where the head of the household is a woman." He went on to add:

" . . . where there is poverty and insecurity people get very dependent on each other to tide them over during crises, so that you have, and this has been found in studies all over the world among poor people . . . [,] a very generous extension of help and hospitality to others, relatives and close friends.

"And this exists not because poor people are necessarily more altruistic or more generous than other people, but because this is really the only way you can survive in a crisis. If you don't have somebody who you can rely on to bail you out with a couple of dollars to get you to the hospital, if one of your kids suddenly gets sick, to provide you a room if your landlord evicts you or if your building burns down or becomes uninhabitable, if this ability to call on somebody for help is not available, then survival for the poor is much more risky. And so what happens is you get a pattern of mutual help, of mutual obligation, people helping each other because they know if they help somebody when they have a problem they will be helped in return.

"One part of this helping phenomenon is people making room in their house for somebody who is in need of shelter temporarily or permanently, and again only in this case on the grounds that if I don't do it for him or her now, he won't do it for me when I am faced with that problem."

Appendix A.

As Dr. Gans pointed out, "This is a very important phenomenon that middle class people don't do much of and don't understand."

It is this need for mutual help that explains, Dr. Gans noted, why housing, which is already inadequate, is shared with others:

> "... especially [in] the New York area, they get small apartments with small rooms, if they are [on] Welfare ... so they live in a minimum space to begin with.
>
> "When somebody else comes in they become more crowded, obviously. But the exchange—they make this sacrifice because again this is a perfect example of obligation of mutual help that I discussed earlier. You make a sacrifice because then you obligate the other person to help you when you are in need."

The effect of enforcing regulations such as we have before us is to force the man out of the house. As Dr. Gans testified:

> "... divorce has always been very difficult for the poor to get because (a) it costs money to get divorced, (b) it costs money to get a lawyer, until recently it was impossible for poor people to get free legal help, so that there has been a long tradition of simply physical separation but no divorce."
>
> • • •
>
> "... I am talking generally [about] what happens in the poor community.
>
> "Quite often the relationship between men and women is a very fragile one, particularly when the men are ... economically marginal in society and told that they are not useful economically, (a) the men don't have much money, (b) their egos are very sensitive and they

might just say well, if you ask me to pay I will just move out on you and that would be the end of—in essence, the relationship would be sacrificed to whatever the rental money was.

"... if the lodger is a man who is living with a woman, he becomes a lodger to serve a variety of functions in the family, helping raise the children, taking care of the house, I think the relationships are such that if the woman asked him for money, in most cases he doesn't have it, even if he had it he might say well, if you put it on that basis, I will just move out and then the woman is deprived of the relationship with the man which is part of life and of the fatherly functions that this kind of lodger often performs."

II. The Law

A. The Due Process Claim

As the Supreme Court again noted this Term in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 644, 94 S. Ct. 791, 798 (1974), declaring invalid a presumption that pregnant women were incapacitated from teaching, "'permanent, irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.'" There is no warrant for automatic denial of a right on the basis of an irrebuttable presumption, "when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline*, 412 U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973) (irrebuttable presumption of non-residency of student invalidated). *See also, e.g., United States Dep't of Agriculture* v. *Murry*, 413 U.S. 508, 93 S. Ct. 2832 (1973) (denying food stamp eligibility on basis of irre-

buttable presumptions of lack of need unconstitutional); *Stanley* v. *Illinois,* 405 U.S. 645, 92 S. Ct. 1208 (1972) (irrebuttable presumption preventing unwed father's custody of child violative of due process); *Stewart* v. *Wohlgemuth,* 355 F. Supp. 1212 (W.D. Pa. 1972) (irrebuttable presumption terminating welfare benefits of college students violative of due process); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (irrebuttable presumption reducing shelter allowance on ground members of household bear pro rata share of expenses violative of due process); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (irrebuttable presumption terminating shelter allowance where stepfather lives in same house violative of due process).

1. The Presumptions Relied Upon by the State

A. *Less space needed if "lodger" present.*

The presumption that a recipient family able to house a noncontributing lodger needs less space for its own use "is not necessarily or universally true in fact." The lodger may be an older child sharing a single or bunk bed with a younger sibling, or a disabled relative sleeping on the couch. If the lodger is the mother's adult male companion, he may be sharing the mother's own bed. None of these plausible factual circumstances fairly imply that the family could realistically subsist in less space.

Moreover, even if we were to assume that a family able to house a noncontributing lodger needs less space for its own use, under present conditions many families could not locate habitable smaller quarters. Plaintiffs' housing expert, Mr. Paul Davidoff, gave uncontradicted testimony that in the New York City metropolitan area, the poor live in housing that is predominantly substandard and in-

adequate in terms of space, and that, therefore, it is highly unlikely that a family on welfare could find and move into a liveable smaller apartment.

The almost zero vacancy rate for low-rental housing in large parts of New York State supports Mr. Davidoff's conclusion. *See, e.g., Talbot* v. *Romney*, 321 F. Supp. 458, 470 (S.D.N.Y. 1970) (vacancy rate drop from 3.2% in 1965 to 1.2% in 1968); *Parkwood Realty Co.* v. *Marcano*, 353 N.Y. Supp. 2d 623, 625 (N.Y.C. Civ. Ct. 1974); 1970 CENSUS OF HOUSING, DETAILED HOUSING CHARACTERISTICS: NEW YORK 34-167, 34-171; State of New York, Executive Department, Division of Housing and Community Renewal, SURVEY REPORT ON RENTAL HOUSING 3 (1969); J. C. Lynn, RECENT HOUSING TRENDS IN WESTCHESTER COUNTY 7, 8 (Westchester Planning Occasional Papers, Winter 1974); REPORT ON HOUSING AND RENTS OF THE TEMPORARY STATE COMMISSION ON LIVING COSTS AND THE ECONOMY 72-73 (1974); Economic Consultants Organization, Inc., RESIDENTIAL ANALYSIS FOR WESTCHESTER COUNTY, GROWTH OF DEMAND AND SUPPLY: 1970-1990, INTERIM REPORT No. 3, 50 (1970); INTERIM REPORT No. 5, 47 (1970). Low cost housing available to welfare recipients is further constricted by negative community attitudes toward minority groups and subsidized housing (INTERIM REPORT No. 5; *supra*, at p. 47; INTERIM REPORT No. 3, *supra*, at pp. 3-4) and the lack of institutional financing available for buildings currently housing recipients. City of New York, THE URBAN HOUSING DILEMMA: THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING 551-53 (Prel. undated). Negative attitudes of landlords and apartment owners toward public assistance recipients also limits availability. City of New York, THE URBAN HOUSING DILEMMA, *supra*, at pp. 555-56, 564-66.

The welfare recipient is put at more of a disadvantage in the ever shrinking housing market since she or he lacks

"contacts" and entries into the market system. Fewer than 10% of recipients obtain housing through the Department of Social Services in Westchester County. INTERIM REPORT No. 7 (1970), *supra,* at pp. xii, 101. "Urban renewal and construction of public housing have had little impact on the number of units available to low income households. In most instances, new units built merely replace existing units removed from the stock." INTERIM REPORT No. 3, *supra,* at p. 3. The long waiting lists for public housing are well known.

It is apparent, therefore, that even if a family housing a noncontributing lodger could subsist without the lodger in a smaller apartment, the family probably could not locate decedent smaller quarters. In that event, the family's rental expenses would remain as high as they were before the lodger came; there would be no diminution of financial need.

If not for the challenged regulations and the irrebuttable presumptions they make, we would have thought it beyond debate that a family on public assistance might choose to house a noncontributing lodger for many reasons other than the presumed excess of living space. For example, a recipient might agree out of familial kindness and generosity to shelter a family member or relative who might otherwise suffer. Or a lonely mother raising her fatherless children might house a friend out of a deep, human need for supportive, adult companionship. A welfare regulation encouraging a woman in Mrs. D's circumstances to remove her "lodger" exacerbates the familial disintegration already experienced by the urban poor.

In short, the presumption that a recipient family able to house a noncontributing lodger needs less space for its own use is neither necessarily nor universally true in fact. The evidence before us shows it has no basis in fact for many AFDC families.

B. *Less financial need where "lodger" present.*

Similarly, the second, alternative, presumption that a recipient family able to house a noncontributing "lodger" —even if the family does not *ipso facto* need less space for its own use—needs less money to pay its own, *pro rata,* share of the rent is neither necessarily nor universally true. Unless the lodger pays a "share" of the rent, the family's rental expenses are not affected by the "lodger's" presence.

But the state may not conclusively presume that a lodger will pay his share of the rent, under the compulsion of a reduced shelter grant, merely because ethically he should or theoretically he could. *See* R. M. O'Neil, THE PRICE OF DEPENDENCY 253-254 (1970) (reasons why many people eligible for relief do not seek it); F. F. Piven & R. A. Cloward, REGULATING THE POOR 165 (Vintage ed. 1972) ("degradation at the hands of relief officials . . . deters actual or potential workers from seeking aid."). "[F]ederal law prohibits a conclusive presumption of support." *Taylor* v. *Lavine,* —— F. 2d ——,——Slip Op. 73-2731 at p. 3477 (2d Cir. 1974). We know from the evidence before us that some AFDC family "lodgers" do not pay anything towards rent.

Certainly "the state has reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412 U.S. 441, 452, 93 S. Ct. 2230, 2236 (1973)) as to space and contribution where a lodger is present or believed present. That alternative means is the "Fair Hearing," a proceeding provided by 18 N.Y.C.R.R. § 358.1-24 to review the reduction of AFDC grants.

Making these individualized determinations may not completely serve the cause of "administrative efficiency" but as the Supreme Court stated in *Stanley* v. *Illinois,* 405

U.S. 645, 656, 92 S. Ct. 1208, 1215 (1972):

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

See also Cleveland Board of Education v. *LaFleur,* 414 U.S. 632, 646, 94 S. Ct. 791, 799 (1974).

Irrebuttable presumptions are offensive to due process because they effectively deny an individual the essential procedural right to challenge the purported factual basis of a determination adversely affecting his own liberty or property. In this case the "property" right in question is the AFDC recipient's statutory entitlement to a shelter allowance commensurate with actual need. Thus the rule against irrebuttable presumption is an aspect of procedural, not substantive, due process. *See Vlandis* v. *Kline,* 412 U.S. 441, 455, 93 S. Ct. 2230, 2238 (1973) (Marshall, J., concurring, joined by Brennan, J.); *see also* Note, The Supreme Court, 1972 Term, 87 Harv. L. Rev. 57, 70 n. 21 (1973); *cf. Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586; (1971); *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970).

Before reducing the shelter allowance of a recipient family because the family houses a noncontributing lodger, the state must make an individualized determination of whether the presence of the lodger does *in fact* diminish the family's shelter needs. If presumptions are used they must be rebuttable. *See* Proposed Federal Rules of Evidence

301, promulgated by the Supreme Court but not yet effective. This constitutionally required result is consistent with the statutory mandate of the federal AFDC program. *See, e.g., Shea* v. *Vialpando,* —— U.S. ——, 94 S. Ct. 1746 (1974); *Lewis* v. *Martin,* 397 U.S. 552, 90 S. Ct. 1282 (1970); *King* v. *Smith,* 392 U.S. 309, 88 S. Ct. 2128 (1968); *Hausman* v. *Dep't of Institution & Agencies,* 64 N.J. 203, 314 A. 2d 362, *cert. denied,* —— U.S. ——, ——, S. Ct. —— (1974); *Rosen* v. *Hursh,* 464 F. 2d 731 (8th Cir. 1972); *Mothers and Childrens Rights Org., Inc.* v. *Stanton,* 371 F. Supp. 298 (N.D. Ind. 1973); *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind.), *aff'd,* 409 U.S. 1070, 93 S. Ct. 688 (1972); *X* v. *McCorkle,* 333 F. Supp. 1109 (D.N.J. 1970); *aff'd per curiam sub nom. Engelman* v. *Amos,* 404 U.S. 23, 92 S. Ct. 181 (1971); *Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C. 1971), *aff'd,* 409 U.S. 807, 93 S. Ct. 39 (1972), *reh. denied,* 409 U.S. 1119, 93 S. Ct. 892 (1973); *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D. Pa. 1969); *Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn.), *aff'd,* 396 U.S. 5, 90 S. Ct. 25 (1969); *Battle* v. *Lavine,* 44 App. Div. 2d 307, 354 N.Y.S. 2d 680 (2d Dep't 1974). *See also* 45 C.F.R. 233.20(a)(1); 233.20(a)(3)(ii); and 233.90(a).

III. Other Claims

A. Anomaly in Regulation

Under state administrative interpretations section 352.30(d) requires a "lodger" to contribute only $15.00 per month to the recipient family's rent; it does not require the lodger to pay a "pro rata share" of the rental. To encourage the taking in of rent-paying lodgers the first $15.00 of lodger income is, under the regulation, ignored. As one of the state's witnesses admitted, the New York statutory lodger policy achieves this anomalous result: if a lodger pays $15.00 per month, the recipient family has nothing de-

ducted from its shelter allowance; but if the lodger pays less than $15.00 or nothing at all, the family has a full, pro rata share of its shelter allowance—in some of the instances before us as much as $50.00—deducted.

The head of a household on welfare might, the witness conceded, avoid the impact of § 352.30(d) altogether by loaning a lodger $15.00 per month to enable him to make a $15.00 rental contribution and then later cancelling the loan if it was not repaid. Generally, however, welfare families are not skilled in the art of self-interested financial manipulation. The possibility, therefore, that all members of the class might evade the regulation does not make it illusory and has no effect on its invalidity.

B. Sex Discrimination

It is not clear that New York's statutory lodger policy makes a distinction on the basis of sex. While § 352.31(a)(3)(iv) is limited by its terms to a "male" lodger, this section is apparently superfluous. Section 352.30(d) speaks of a "non-legally responsible relative or unrelated *person*" (emphasis added); this section, standing alone, presumably would apply to a female living with but not married to a father-recipient no less than a male living with but not married to a mother-recipient.

C. Free Association and Privacy

The State of New York is entitled—and as a participant in the federal AFDC program is under a duty—to determine actual need in granting welfare, including shelter assistance. Inquiring whether a lodger's presence in fact indicates a diminished need for shelter assistance is hardly a violation of plaintiffs' rights. The constitutionally protected rights of free association and privacy do not compel the states to misallocate their scarce welfare resources. The

problem with the regulations under challenge here is not that they somehow invade rights of free association or privacy, but that they do not determine *actual* needs; rather they proceed on the basis of irrebuttable presumptions neither necessarily nor universally true in fact. Only if the challenged regulation sought to prescribe plaintiffs' familial or sexual life style, would the free association-private claim merit further consideration. *See United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528, 93 S. Ct. 2821 (1973).

D. Equal Protection

Plaintiffs also claim that the challenged regulations deny them equal protection of the laws. The challenged regulations distinguish between two groups of welfare recipients: those who house a non-contributing lodger and those who do not. The purported objective of this distinction is a constitutionally appropriate one since, as we have pointed out, New York may seek to allocate its scarce welfare resources where they are most needed. The related issue of whether there is a factual basis making at least rational the legislative judgment that families housing noncontributing lodgers have a diminished need for shelter allowance, must be resolved by individualized determinations in accordance with the mandate of due process. In the circumstances of this case, the equal protection claim overlaps analytically with the due process claim. It is, therefore, unnecessary to articulate a separate equal protection ground of decision.

E. Mootness

Since the controversy affects many AFDC families and this is a class action, there is no need to decide whether a particular named plaintiff is still being adversely affected by the challenged regulations. *Taylor* v. *Lavine,* —— F. 2d ——, ——n. 3, Slip Op. 2731 at 3473 n. 3 (2d Cir. 1974).

Where there are numerous class members who suffer the same harm complained of by the named plaintiffs, or who are subject to like treatment in the future, the action does not become moot as to them and there remains a justiciable controversy. *See, e.g., Richardson* v. *Ramirez,* —— U.S. ——, —— S. Ct. ——, Slip Op. 72-1589 at pp. 14-15 (1974); *Johnson* v. *New York State* Education Dep't, 409 U.S. 75, 76, 93 S. Ct. 259, 260-61 (1972) (Marshall, J., concurring); *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28 (5th Cir. 1968); *Steinberg* v. *Fusari,* 364 F. Supp. 922, 928 (D. Conn. 1973), appeal pending, —— U.S. ——, 94 S. Ct. 1406 (1974).

IV. Conclusion

Section 18 N.Y.C.R.R. § 352.30(d) and § 352.31(a)(3)(iv) are invalid to the extent stated in this opinion. The parties shall settle an order on forty-eight hours notice.

So ordered.

Date: New York, New York

August 5, 1974

Jack B. Weinstein
Arnold Bauman

Hurley v.
Van Lare

Hays, *Circuit Judge*, dissenting:

I dissent.

The challenged regulation, 18 N.Y.C.R.R. § 352.30(d), is not unconstitutional. It sets up no "irrebutable presumption . . . not necessarily or universally true in fact." *Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).

In *Taylor* v. *Lavine,* Docket No. 73-2731, slip op. at 3465 (2d Cir. 1974), the Second Circuit considered the validity of section 352.30(d) in light of section 406 of the Social

Security Act, 42 U.S.C. § 606(a)(1970), and 45 C.F.R. § 233.90(a). In *Taylor* the court held that section 352.30 (d) does not create an irrebutable presumption of contribution offensive to section 406(a) or the federal regulation.[1] It reasoned that prorating shelter costs between AFDC-eligible and non-eligible members of a household insures that AFDC funds are disbursed only to individuals who have demonstrated their need for assistance. It found that the New York regulation is reasonably justified by considerations such as the severability of individual needs, the divisibility of space, and the economies of scale that result from combining small living units into larger groups:

> "Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. Indeed, if a seection 352.30(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share. . . ." *Taylor* v. *Lavine*, Slip op. at 3477-78.

The *Taylor* holding controls the present case. A non-contributing lodger, like the majority's Mr. M., must by necessity either have the means to make a pro rata contribution to the recipient household, or he must lack such means. If the lodger is financially able to contribute to the cost of maintaining the household, New York surely does not offend due process by abating the shelter allowance of the AFDC recipient pro rata according to the lodger's share. If the lodger is not financially able to contribute his share, New York permits him to establish his separate eligibility for public assistance. We have been assured that New York does not require persons of demonstrated need to go without shelter. Should the lodger establish his eligibility,

it is admitted by all parties that a household like the Mrs. D-Mr. M. household would receive a shelter allowance increased over the amount received by the D household alone.[2]

It is thus clear that the New York regulation "presumes" that a lodger has the will and means to contribute his or her fair share toward housing expenses unless the lodger demonstrates separate eligibility for public assistance. Any "presumption" of the lodger's means may be refuted at the lodger's initiative in the same forum in which the AFDC recipient was initially required to establish a need for aid. The "conclusive presumption" denounced by the majority is the same "presumption" that attaches to every member of our society: that he is able to pay his own way until and unless he demonstrates the contrary. If the lodger is eligible for public assistance but does not apply, his silence cannot be put at the state's door. If the lodger is too proud to accept welfare—Mrs. D's testimony indicates that such was Mr. M's motive for not applying for aid—then he ought to be too proud to accept aid from the state indirectly through the eligible AFDC recipient. A noncontributing lodger like Mr. M. has and eats his public assistance cake without demonstrating his need.

The majority states that the aid recipient's "Fair Hearing" under 18 N.Y.C.R.R. § 358.1-358.27 is a "reasonable alternative means" for determining the amount of a lodger is willing or able to pay toward the cost of housing. But this statement glosses over the obvious difficulty of determining the means or intent of a person who has not put his affairs before the Social Services Department by applying for public assistance. In none of the recent Supreme Court due process cases cited by the majority did the reasonable alternative means of factfinding entail intrusion into the affairs of any person who did not apply for or seek a governmentally administered benefit or right.

Section 352.30(d) does not "exacerbate [ ] the familial disintegration already experienced by the urban poor." It does not necessarily upset the established patterns of cooperation between people of limited and uncertain means. So long as each member of a group cooperating as a household establishes his eligibilit yfor public funds, cooperating will increase the shelter allowance due the whole.[2] In any event, the procedure implicitly sanctioned by the majority, requiring the lodger to submit his affairs to the New York Social Services Department in the context of the AFDC recipient's "Fair Hearing," is surely no less conducive to "familial distintegration" than requiring the lodger to demonstrate his need on his own application.

While assailing the rationality of section 352.30(d), today's majority embraces irrationality. It creates a unique class of persons who may receive the benefit of state aid without demonstrating any need for such aid. It prefers lodgers in AFDC recipient households over all other lodgers. It prefers lodgers in AFDC households over the eligible AFDC recipients themselves, since the latter must bear the burden of demonstrating their eligibility. In our complex society there are no simple means of identifying households in need of state assistance, or of allocating the limited stock of resources among individuals who have demonstrated a need for such assistance. Section 352.30(d) is a valid attempt by New York to make such an allocation and it ought to be upheld.

FOOTNOTES

[1] The *Taylor* court remanded the case so that the constitutional issues might be considered by a three-judge district court. The present case is the result of that remand. The opinion of the present majority ignores the *Taylor* rationale and in effect holds that section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) are unconstitutional as applied in the Second Circuit.

[2] Under locally administered regulations, shelter allowances increase in rough proportion to the number of eligible persons in the recipient household. Were Mr. M. to establish his eligibility for public assistance there would be an additional eligible person in the household, and the shelter allowance would accordingly be increased.

APPENDIX B

Opinions of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 669 & 701—September Term, 1973.

(Argued December 21, 1973 Decided May 14, 1974.)

Docket Nos. 73-2731
73-2671

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees,

v.

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants.

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees,

v.

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually, and in his capacity as Commissioner of the Department of

Appendix B.

Social Services of the State of New York, Louis P. Kurtis, individually, and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants.

Before:

Friendly, Hays and Oakes,

Circuit Judges.

Appeals from orders entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, and the United States District Court for the Southern District of New York, Arnold Bauman, *Judge*, enjoining appellants from enforcing the New York Department of Social Services Regulations, 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv), and declaring those regulations contrary to 45 C.F.R. § 233.90(a).

Reversed and remanded.

Martin A. Schwartz, The Legal Aid Society of Westchester County, White Plains, New York (Leonard S. Clark, Nassau County Law Services Committee, Inc., Hempstead, New York, on the brief; Lawrence S. Kahn, The Legal Aid Society of Westchester County, White Plains, New York, of counsel), *for Appellees.*

Judith A. Gordon, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief, Constance M. Margolin, Assistant Attorney General, of counsel), *for Appellants.*

Appendix B.

HAYS, *Circuit Judge*:

This court is again called upon to pass on a challenge to New York's administration of its program for state Aid to Families with Dependent Children (AFDC).

The federal AFDC program found in sections 401 to 444 of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-644 (1970), provides financial aid to states on a matching funds basis to assist the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . .", 42 U.S.C. § 606(a) (1970). Each state wishing to qualify for sums appropriated by Congress must submit a plan for "aid and services to needy families with children," 42 U.S.C. § 601 (1970). The plan must contain each provision on the list set forth in section 402(a) of the Social Security Act and must be approved by the Secretary of Health, Education and Welfare, 42 U.S.C. § 602(b) (1970). Among the requirements found in section 402(a) are that the state plan furnish aid "with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10) (1970), and that the state agency in determining need "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." 42 U.S.C. § 602(a)(7) (1970). New York has submitted such a plan and from time to time amended it. The plan and amendments have been approved by the Secretary.

Among the New York regulations under which AFDC funds are distributed are 18 N.Y.C.R.R. § 352.30(d), which reduces the maximum shelter allowance available to a recipient family pro rata to the extent that there are non-eligible lodgers living in the household, and 18 N.Y.C.R.R. § 352.31(a)(3)(iv), which treats a man living with a female recipient but not married to her as a "lodger." Plaintiffs Hurley, Taylor and Otey challenged these regu-

lations in separate actions in two federal district courts as creating a conclusive presumption offensive to due process, as denying them the equal protection of the laws, and as invading their rights to privacy and free association. They also claimed that the regulations are in effect "substitute parent" regulations forbidden for state plans by section 406(a) of the Social Security Act and 45 C.F.R. § 233.90(a) (1973). The single district judge upheld the statutory claims and thus found it unnecessary to consider whether a court of three judges should be convened under 28 U.S.C. § 2281.

The New York regulations in question provide as follows:

> "When a female applicant or recipient is living with a man to whom she is not married . . . his available income and resources shall be applied in accordance with the following:
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> • • •
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> "(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)."[1] 18 N.Y.C.R.R. § 352.31(a)(3).
>
> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding

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[1] In the version of 18 N.Y.C.R.R. before the district courts, 18 N.Y.C.R.R. § 352.31(a)(3)(iv) referred to section 352.30(c), rather than to section 352.30(d). The *Hurley* district court held that the reference was erroneous, that it should have been to section 352.30(d). —— F. Supp. —— at n.1. Appellants, state officials entrusted with administering the regulation, did not contest that determination. The text of section 352.31(a)(3)(iv) was amended effective April 2, 1973, to refer to section 352.30(d).

lodger. . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 N.Y.C.R.R. § 352.30(d).

45 C.F.R. § 233.90(a) (1973) provides as follows:

"A State plan under title IV-4 of the Social Security Act [relating to the AFDC program] must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions."

Appendix B.

The district court in each of the two cases found the New York regulations offensive to the Social Security Act and 45 C.F.R. § 233.90(a), and accordingly granted declaratory and injunctive relief. We reverse and remand for the convening of a three-judge court to consider the constitutional issues raised by the appellees.

I.

The facts in both cases are uncontroverted.

A. *Hurley* v. *Van Lare.*

Appellee Rose Hurley lives with her three dependent children, aged ten, five and five years, in Mount Vernon, New York. She and her children have been living apart from her husband since 1967; she has had no contact with him since 1967 and does not know where he is. The Hurleys receive public assistance under the New York AFDC plan as it is administered by the Westchester County Department of Social Services.

During the four-month period from November 1970 to February 1971, an unrelated male friend of Mrs. Hurley stayed with her and her children at their Mount Vernon residence. The friend was under no legal obligation to support the Hurleys, and in fact he made no contribution to their support. His presence did not increase the amount of rent that Hurley was obliged to pay, $150.00 per month. During the same four-month period, the Westchester Department of Social Services deducted $35 per month from Hurley's recurring AFDC grant, presumably in accordance with 18 N.Y.C.R.R. § 352.30(d).

On November 12, 1970, Hurley requested a "Fair Hearing," a proceeding provided for in 18 N.Y.C.R.R. §§ 358.1-358.27, to review the reduction of her AFDC grant. A hearing was held on March 22, 1971, and on September 20, 1971, appellant Van Lare, the Acting State Commis-

sioner of the Department of Social Services, rendered a "Decision after Fair Hearing" in which he found the facts to be substantially as stated above. He upheld the determination of the Westchester County Department that Hurley's grant should be reduced, but diminished the amount of the reduction to $30.00.

Thereafter, on August 11, 1972, Hurley brought an action in the District Court for the Southern District of New York on behalf of herself and all others similarly affected by sections 352.31(a)(3)(iv) and 352.30(d) to secure declaratory relief, an injunction against enforcement of the regulations, and judgment for retroactive AFDC payments.

Defendants Van Lare and Lavine, appellants here, are respectively Acting Commissioner and Commissioner of the Department of Social Services of New York, and defendant Kurtis is Commissioner of Social Services for Westchester County.

Hurley based her demand for an injunction on the theory that she has not associated with her friend out of fear that her public assistance grant will be reduced, as it was in November 1974, by the enforcement of sections 352.31(a)(3)(iv) and 352.30(d). She contended that the regulations are offensive to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that they are in violation of her rights of privacy and free association, and that they are invalid under sections 402 and 406 of the Social Security Act, 42 U.S.C. §§ 602, 606 (1970), and 45 C.F.R. § 233.90(a).

The district court did not convene a three-judge court under 28 U.S.C. § 2284 (1970) to consider the merits of the constitutional claims. See 28 U.S.C. § 2281 (1970). But the district court determined that at least the Due Process claim is sufficiently substantial to vest the court with sub-

ject matter jurisdiction under 28 U.S.C. § 1343(3) (1970), and that under the doctrine of pendent subject matter jurisdiction it had the power to decide the statutory claim.

On Hurley's motion for summary judgment, the district court held that the New York regulations violate section 406 of the Social Security Act and 45 C.F.R. § 233.90(a), as interpreted by the Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968), and *Lewis* v. *Martin*, 397 U.S. 552 (1970):

> "[T]he inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing made lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.
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> "The [New York] regulations thus conflict directly with § 233.90 . . . . Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis*." —— F. Supp. at ——.

In granting summary judgment, the district court gave declaratory relief and enjoined appellants from enforcing the challenged regulations, but denied Hurley's claim for retroactive welfare payments.[2] The district court also granted Hurley's motion that the action be designated a class action under Rule 23(c).

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[2] The district courts properly denied retroactive payments, relying on our decision in *Rothstein* v. *Wyman*, 467 F.2d 226, 235 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), which has recently been approved by the Supreme Court in *Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419, 4423 (Mar. 25, 1974).

Appendix B.

The appellants have appealed the order granting the summary judgment and class action motions, and Hurley has appealed the denial of retroactive benefits.

B. *Taylor and Otey* v. *Lavine.*

Annie Taylor, her six-year-old child, and her sister, Virginia Taylor, live together in Freeport, Long Island. Annie Taylor and her child receive public assistance under the New York AFDC program as it is administered by the Nassau County Department of Social Services. Prior to January 1, 1973, the sister had received aid under the state home relief program, but after that date she received no public assistance. The sister is under no legal obligation to support Annie Taylor or her child, and she in fact makes no contribution to Taylor's $180 monthly rental.

Prior to January 1, 1973, the three Taylors were receiving $155 per month in shelter allowance, the maximum allowance available for a household of three persons according to a schedule issued by the Nassau County Department of Social Services. When the sister was dropped from the home relief program, Annie Taylor's shelter allowance was reduced to $110.00, two-thirds of $155, under 18 N.Y.C.R.R. § 352.30(d). Taylor requested the maximum shelter allowance for two persons, $145.00. Her request was denied. She demanded and received a "Fair Hearing" at which facts were found substantially in accordance with the foregoing statement. Because the diminished shelter allowance was not enough to pay her rent, Taylor fell behind in her rental payments and was eventually the subject of an eviction order.[3]

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[3] The eviction order was nullified when Taylor paid her overdue rent out of the proceeds of her April 1973 grant, a grant increased to the pre-January 1, 1973, level because of the fact that her sister began to receive aid under the joint federal-state Aid to the Disabled Program on March 14, 1973. On the

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Plaintiff Charlotte Otey and her thirteen-year-old son, like the Taylors, reside in Freeport, and are recipients of AFDC aid. When Otey's 23-year-old son, not a public assistance recipient, moved into the Otey apartment in October, 1972, Otey's shelter allowance was reduced from $145.00, the maximum allowance for two people, to $96.65, two-thirds of the maximum. Otey demanded an opportunity for a "Fair Hearing," which was granted, but she failed to appear.

Taylor and Otey brought an action in the Eastern District of New York, making claims similar to those asserted in *Hurley* v. *Van Lare,* and seeking similiar relief, except that they did not contest the validity of 18 N.Y.C.R.R. § 352.31(a)(3)(iv). Defendant Shuart is Commissioner of the Department of Social Services of Nassau County. The district court granted the plaintiff's motion for summary judgment, and gave the declaratory and injunctive relief sought, adopting the *Hurley* district court's "reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief. . . ." It denied retroactive AFDC payments.

Lavine and Shuart appeal from the summary judgment.

II.

Without passing on the constitutional claims, we agree they are sufficiency substantial to support jurisdiction under the liberal test the Supreme Court has recently announced in *Goosby* v. *Osser,* 409 U.S. 512 (1973). Where the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction,

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basis of the limited record before us we do not decide whether Taylor's claim for declaratory and injunctive relief is moot. On remand, the district court should consider whether her claim presents a justiciable controversy. See *Hall* v. *Beals,* 396 U.S. 45, 48 (1969); *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

Hagans v. *Wyman,* —— U.S. ——, 42 U.S.L.W. 4381 (Mar. 25, 1974), and, if he sustains it, to defer requesting a three-juge court under 28 U.S.C. § 2281, pending review.

Hurley, Taylor and Otey base their claim that the New York regulations are contrary to federal law on two Supreme Court decisions: *King* v. *Smith,* 392 U.S. 309 (1968), and *Lewis* v. *Martin,* 397 U.S. 552 (1970). On careful consideration of these cases, it is clear that neither justifies the district courts' interference with New York's program for distributing AFDC grants.

In *King* v. *Smith,* 392 U.S. 309 (1970), Alabama AFDC recipients brought an action to enjoin enforcement of a state regulation which provided that "an 'able-bodied man, married or single, is considered a substitute father of all the children of the applicant . . . mother' . . . if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation.' " 392 U.S. 313-14 (emphasis deleted). The effect of the regulation under Alabama law was to remove the family from the category of aid recipients created by section 406(a) of the Social Security Act: because of the presence of the "substitute father," Alabama presumed that there was no "continued absence . . . of a parent." 42 U.S.C. § 606(a) (1970). The Supreme Court held that the Alabama rule "defines 'parent' in a manner that is inconsistent with § 406(a) of the Social Security Act." 392 U.S. at 333. Reasoning that the purpose of the federal AFDC program is to protect and benefit needy and dependent children, the Court said that "the only kind of 'parent,' under § 406(a), whose presence in the home would provide adequate economic protection for a dependent child is one who is legally obligated to support him." 392 U.S. at 332.

Alabama asserted that two state governmental interests were advanced by the substitute father rule: the state's interest in discouraging meretricious sexual relationships,

and the state's interest in allocating its share of AFDC funds according to the needs of its citizens. As to the first interest, the Supreme Court allowed that states generally have broad discretion in regulating sexual behavior outside of marriage, but held after examining the legislative history of the Social Security Act that Congress did not intend section 406(a) to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct. 392 U.S. at 320-27. As to the second interest, the Court granted that Alabama had the power to set the level of benefits and standard of need under its plan, but held that in determining need it must account for the actual resources of the child. 392 U.S. at 332.

In one sense, the *King* holding does not bear directly on the instant case. Unlike the Alabama substitute father regulation, the New York regulation does not presume to define "parent" artificially to deny eligibility to the family housing a lodger. The meaning of the term "parent" as it used in section 406(a) is therefore not directly at issue. The New York regulation merely determines the level of payment to the eligible family on the basis of the presence or absence of a lodger in the recipient household. This method of computing shelter allowance is permitted under the *King* v. *Smith* rationale if it is not designed to vindicate a moral interest unrelated to the need of the family, and if it realistically determines the level of need. As to the first point, it is clear that there is not the punitive aspect to the New York regulation that there was in the Alabama substitute father regulation. This is not a case of New York trying to impose "middle class morality" on the welfare recipient, using AFDC as an instrument of social control. This fact is illustrated by the Otey and Taylor cases, cases in which the shelter allowances were reduced because of the presence of persons other than

the mother's paramour in the recipient household. The appellees' claim that sections 352.30(d) and 352.31(a)(3)(iv) offend the principle in *King* v. *Smith* thus stands or falls on their assertion that the regulations create a conclusive presumption of lodger contribution to the AFDC unit's rental expense, and that this presumption does not account for the actual needs of the AFDC-eligible family.

Under the long-standing administrative interpretation of section 402(a)(7) of the Social Security Act, only real sources of income may be considered by the state in determining need. The most recent embodiment of that interpretation, second 233.90(a) of the Health, Education and Welfare regulations governing the content of state plans, clearly states that the presence of any individual except a person legally obliged to support the child "is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." Any doubt remaining on the issue was removed by the Supreme Court's holding in *Lewis* v. *Martin*, 397 U.S. 552 (1970), that section 233.90(a) precluded California from attributing income to an AFDC-eligible child from a non-adopting stepfather who had no duty of support under state law.

Although we agree that federal law prohibits a conclusive presumption of support, we do not agree that the New York regulations here in question imply such a presumption. The regulations imply only that the lodger's presence evidences the recipient family's diminished need for housing space. Section 352.30(d) does not attribute a non-existent obligation of support to the lodger, nor does it deny the AFDC-recipient children or caretaker their share of the actual housing expenditures. Prorating housing costs between the recipient and non-recipient simply reflects the separability of the need of the AFDC-eligible family members from the needs of persons who have not demonstrated their eligibility for public assistance. In-

deed, if a section 352.20(d) lodger can separately demonstrate his eligibility for public aid, the AFDC shelter allowance is increased to include his share, a principle illustrated by the Taylor case. See note 3, supra.

Appellees have attempted to justify their position by incanting the words "conclusive presumption of contribution." But it is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use that it is paying rent for. Appellees do not dispute that in the event an eligible family chooses to live as lodgers in a portion of a non-eligible person's house, the state may pay only the eligible family's pro rata share of the total rent, regardless of contribution, without offending federal law: the recipient family would be due shelter allowance only for that portion of the house they were actually using. The outcome is no different when the AFDC family uses a portion of its own premises to house a non-eligible person, whether or not that person contributes to the rent.

Prorating housing expenses among recipients and non-recipients of public aid accounts for the economies of scale that are realized when individuals live in groups; per-individual housing costs decrease as the number of individuals living together increases. In the Hurley case, for example, Hurley, her three children, and her lodger can live at a lower per capita housing cost than can Hurley and her children alone. Thus, the New York scheme does not attribute a false duty of support or a false source of income, but rather accounts for the actual cost of housing to an AFDC-recipient family.[4]

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[4] In preparing for these appeals, the New York Department of Social Services addressed a letter to the Regional Attorney of the Social and Rehabilitation Service of the Department of Health, Education & Welfare containing a request for an opinion on the following question:

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The New York regulations have a more limited objective than those held invalid in *King* and *Lewis*. The objective of section 352.30(d) is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it. Unlike the Alabama and California regulations, the New York regulations do not cut off all aid to families having non-eligible persons in their households. They merely prevent non-eligible persons from benefitting from free living space.[5] New York's interest in preventing non-eligible persons from sharing in AFDC benefits is coextensive with the federal interest in allocating AFDC appropriations only to eligible persons. Section 402(a)(10) of the Social Security Act, 42 U.S.C. § 602(a)(10) (1970), states that aid must be furnished "with reasonable promptness to all eligible individuals," language necessarily implying that aid should not be furnished to non-eligible individuals.

Reversed and remanded.

"Is a state policy of prorating a shelter allowance so as to reflect the percentage of public assistance recipients residing in a household valid under 45 CFR 233.90?"

The response of the Regional Commissioner of the Department was available a short time after these appeals were argued:

". . . HEW has permitted states to prorate shelter allowances to reflect the percentage of public assitance recipients in a household. Such a proration is not considered an assumption of income, but rather a recognition that per-individual costs decrease as the number of individuals living together increases."

[5] In *Battle* v. *Lavine*, —— App. Div. —— (2d Dep't April 22, 1974), the Appellate Division held that the regulation prorating shelter allowance violated 45 C.F.R. § 233.90. Solely on the authority of the district court's decision in *Hurley* v. *Van Lare*, it rejected the proposition that the purpose of the New York regulation is to prevent non-eligible persons from benefiting from shelter allowance payments. Since we reverse *Hurley* v. *Van Lare*, we do not give any weight to the Appellate Division's holding.

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OAKES, *Circuit Judge* (dissenting):

The majority decision today reverses two distinguished federal trial judges and reaches a conclusion quite contrary to that of an Appellate Division of the New York Supreme Court, and antithetical to decisions of the Supreme Court of New Jersey, and of federal district courts in Massachusetts, Indiana and Georgia.[1] It also disregards the mandates of Supreme Court decisions from *King* v. *Smith*, 392 U.S. 309 (1968), to *Shea* v. *Vialpando*, 42 U.S.L.W. 4559 (U.S. Apr. 23, 1974). As such, today's majority opinion stands nakedly—and thankfully—alone, for the majority permits a state to deprive the dependent children of a needy family of a portion of their allowances for shelter because some person—whether an unemployed adult child, a disabled (but ineligible) sister, or a male "friend"—resides in the same household. The result I think flies in the teeth of the federal law and Supreme Court decisions, disregards economic realities and is quite unjust to the needy children otherwise entitled to assistance.

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[1] *Battle* v. *Lavine*, —— App. Div. ——, —— N.Y.S.2d —— (2d Dep't Apr. 22, 1974). *Contrary to the majority's suggestion*, at note 5, the New York court's decision was not merely based *on the authority of Hurley* v. *Van Lare*. One would be surprised were a high court of the sovereign state of New York to determine *the purpose of a state regulation* "[s]olely on the authority of [a federal] court's decision." Majority opinion at note 5. Rather *Hurley* v. *Van Lare* was simply cited for the proposition that the federal district court had reached one of the same conclusions as the Appellate Division—that "notwithstanding the [State's] protestations that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible." —— App. Div. at ——, —— N.Y.S.2d at ——. Other shelter allowance cases contrary to the majority decision include *Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). *See also Mothers and Childrens Rights Organization, Inc.* v. *Stanton*, 371 F.

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The majority today finds two challenged New York regulations in conformity with the federal statute, 42 U.S.C. § 602(a)(7),[1a] and regulation, 45 C.F.R. § 233.90(a)(1973).[2] The first challenged regulation, 18 NYCRR

Supp. 298 (N.D. Ind. 1973); *Owens* v. *Parham*, 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court), all of which are unmentioned by the majority opinion.

[1a] 42 U.S.C. § 602 reads, in pertinent part:

(a) A State plan for aid and services to needy families with children must . . .

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

[2] 45 C.F.R. § 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [sic] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing finan-

§ 352.31(a)(3)(iv),[3] is New York's administrative soft shoe around *King* v. *Smith, supra.* New York defines a man who lives with a woman to whom he is not married and for whom he does not assume financial responsibility as a "lodger." In *King,* Alabama had defined a man who engaged in the same conduct a "parent." In *King* the result of that definition was to disqualify the AFDC *child* from receiving any benefits; in the present case the result of New York's definition of the man as a "lodger" is also to disqualify the AFDC child, although only from a portion of his benefits. Thus by New York's cleverness in changing a "parent" to a "lodger," it has managed, with the aid of today's decision, to accomplish what a number of other states have not—the reduction in the AFDC's child's benefits on the basis of the mother's living arrangements. *See, e.g., Lewis* v. *Martin,* 397 U.S. 552 (1970); *King* v. *Smith, supra; Rosen* v. *Hursh,* 364 F.2d 731 (8th Cir. 1972); *Reyna* v. *Vowell,* 470 F.2d 494 (5th Cir. 1972); *Boucher* v. *Minter,* 349 F. Supp. 1240 (D. Mass. 1972) (three-judge court); *Owens* v. *Parham,* 350 F. Supp. 598 (N.D. Ga. 1972) (three-judge court); *Gaither* v. *Sterrett,* 346 F. Supp.

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cial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

[3] 18 NYCRR § 352.31(a) . . .

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

. . . (iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

1095 (N.D. Ind.) (three-judge court), *aff'd*, 409 U.S. 1070 (1972). At least one state has been frustrated twice, *see X* v. *McCorkle*, 333 F. Supp. 1109 (D.N.J. 1970), *aff'd sub nom. Engleman* v. *Amos*, 404 U.S. 23 (1971); *Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). And, interestingly, the majority, by not striking down this regulation, runs directly counter to its *own* assessment of what *King* stands for—"that Congress did not intend [AFDC] to be a lever in the hands of state legislators to compel compliance with local standards of moral conduct."

This determination may not be so harsh as it sounds, however, for it seems plain enough that the three-judge court should find this regulation unconstitutional. The definition of a "lodger" as a man who lives with a woman to whom he is not married, while not defining a woman who lives with a man as such, is so patently a violation of equal protection on the basis of sex, *see Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971), that, whether sex is regarded as a "suspect" classification or not, the State is unlikely to be able to find a justification for the classification here.

The other regulation under challenge here, 18 NYCRR § 352.30(d),[4] is the more significant—both because its elev-

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[4] 18 NYCRR § 352.30(d):

> A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

erness makes it more insidious and because, even absent the other regulation defining "lodger," this regulation also permits the reduction of recipient children's benefits as a result of whom the mother allows to live in the house, the apartment or tenement as the case may be. This regulation provides that if a lodger pays $15 a month or more, that amount will be considered income to the recipient family.[5] If, however, the lodger pays nothing, or less than $15, then a pro rata share of the shelter allowance, including fuel for heating, will be deducted from the *family's* benefits.[6] This is the regulation which resulted in plaintiff Taylor and her six-year-old child receiving an eviction notice because a reduced shelter allowance made it impossible to meet the rent. Plaintiff Taylor's "lodger"? Her disabled sister. This is the regulation which requires plaintiff Otey to throw her unemployed, ineligible-for-welfare, 23-year old son out on the street, because if he lives

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[5] This actual contribution, like all other income, will result in a reduction of the family's benefits under the theory that welfare will only provide that money necessary to bring a family up to its level of need. This section of the regulation is unchallenged and, in my view, comports entirely with the intent of the federal statute and regulations.

[6] Those on welfare are sure to learn quickly that they will maximize their benefits by *claiming* that they receive $15 a month from their lodger, resulting in only a $15 diminution of their shelter allowance. In this way they will lose only $15 of benefits, rather than a pro rata share, which normally would be more. Thus, in Hurley's case the pro rata reduction was $35, although she received no contribution from her male friend. In Taylor's case the pro rata reduction was $55, although she received no contribution from her sister. In Otey's case the pro rata reduction was $48.35 although she received no contribution from her son. One may wonder about the rationality of a system which deducts $55 from someone receiving no contribution, but only $15 from someone receiving a $15 contribution.

in the home their shelter allowance will not be sufficient to pay the rent, while if he moves out the State will pay the full amount.[7]

The majority concedes that if this regulation *conclusively presumed* the availability of income from the lodger and reduced the AFDC child's benefits on that basis, then the regulation would be unlawful under the HEW regulation. Rather than find such a presumption inherent in the regulation, however, the majority advances two independent bases or objectives of the regulation as compatible with the federal law and regulation. Each of them is in my view wholly lacking in sufficiency.

The first allowance "basis" for the regulation found by the majority is "the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space for its own use than it is paying rent for." While "it is clear" to the majority that this inference is the basis of the regulation, this was not the basis claimed by the State either in the court below or in this court.[8] Rather this "basis" for the regulation lies in my colleagues' fertile imagination. If this case were here now upon an equal protection challenge, then the majority might properly try to find a reasonable basis for the classification. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). But this is

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[7] Compare this result with the federal purpose "to help maintain and strengthen family life," 42 U.S.C. § 601, and the federal requirement that states provide services" for the purpose of preserving . . . the family. . . ." 42 U.S.C. §§ 602(a)(13), 602(a)(14), 606(d). *See Shea* v. *Vialpando,* 42 U.S.L.W. 4559, 4560 (U.S. Apr. 23, 1974). *See also Rodriquez* v. *Vowell,* 472 F.2d 622, 626 (5th Cir)., *cert. denied,* 412 U.S. 944 (1973).

[8] It would indeed be hard to maintain that this is the basis for the rule, because as soon as the "lodger" moves out, the full shelter allowance is restored. If the presence of the lodger demonstrated excess space, as maintained by the majority, then his moving out would not be a reason to resume full shelter payments.

not an equal protection challenge. It is a challenge under a federal statute and regulation which through several years and many case of judicial scrutiny have taken on substantive requirements well beyond those of the Equal Protection Clause. Primary among those requirements is that *a child's resources are to be measured in actuality, not on the basis of a presumption. See, e.g., Shea* v. *Vialpando*, 42 U.S.L.W. 4559, 4562 (U.S. Apr. 23, 1974). The majority acknowledges the federal prohibition of a presumption of support. Support, however, is just one type of resource affecting a family's need; the amount of available living space is another. Yet in place of a presumption of support, the majority substitutes a *conclusive presumption that whenever there is a "lodger" the family has more space than it needs.* As such, it may well be contrary to fact: the older brother may be sharing a single bed with a younger one; the disabled sister may be sleeping on the couch.

Labeling the New York regulation a "fair inference" does not change its conclusive nature where a showing contrary to the inference will not affect the shelter allowance reduction; here the only fact considered by the State in the fair hearing is the presence or absence of a lodger, not the amount of space in the apartment. If the regulation provided only for a rebuttable presumption, whether of payments by the lodger or of excess space, there might well be a different question.[9] Thus, the majority, in upholding the

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[9] In *Mothers and Childrens Rights Organization, Inc.* v. *Stanton*, —— F. Supp. ——, Civ. No. 72 F 69 (N.D. Ind. 1973), the court found regulations almost identical to New York State's in conflict with the federal law and regulations as applied. The court found that making a presumption of support, if rebuttable, was lawful, but if the presumption was irrebutable in practice, then it was unlawful. *Accord, Hausman* v. *Department of Institutions and Agencies*, 64 N.J. 203, 314 A.2d 362 (1974). In *Owens* v. *Parham*, 350 F. Supp. 98 (N.D. Ga. 1972) (three-judge court), the court also found a presumption in analytically identical regulations,

regulation on this basis, creates a conclusive presumption regarding the child's needs which has the effect of reducing the AFDC child's benefits. This directly contravenes the HEW regulation which provides:

> [A state plan must] [p]rovide that the determination of need and amount of assistance for all applicants and recipients will be made on an *objective and equitable basis* . . . .

45 C.F.R. § 233.20(a)(1) (emphasis added). The majority's conclusive presumption of the child's need, or lack of it, also violates what seems to me the clear import of *Shea* v. *Vialpando, supra; King* v. *Smith, supra; Lewis* v. *Martin, supra;* and HEW regulation, 45 C.F.R. § 233.90(a), that a family's resources (be they income or amount of living space) be determined by what it *actually* has or receives, not by presumptions or inferences.[10] If such a

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upheld the regulations on their face, but found them *unconstitutional* as applied, because recipients whose shelter allowances were reduced as a result of non-eligibles residing in the household were not given an opportunity to rebut the presumption. The Supreme Court in *Shea* v. *Vialpando,* 42 U.S.L.W. at 4564, suggested a similar solution in finding a uniform allowance for work-related expenses unlawful under the Act. The Court said that if there were provided an opportunity for individualized consideration where the allowance was not sufficient, then the allowance would not be unlawful.

[10] In *Shea* v. *Vialpando, supra,* the Court declared a Colorado uniform allowance for work-related expenses incompatible with the Social Security Act, saying:

> From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered.

42 U.S.L.W. at 4562 (emphasis original).

presumption be the basis for the New York regulation,[11] it is in violation of federal law, and the regulation must fall.[12]

An "objective" of the New York regulation, according to the majority, "is to insure that all of the beneficiaries of an AFDC grant are entitled to enjoy it." Clearly the State is not required, or for that matter allowed, to extend AFDC benefits to ineligible persons. The question, however, is whether this regulation serves to keep AFDC benefits from the ineligible, or whether instead it unlawfully withholds benefits from those rightfully entitled to

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[11] New York's regulations requiring initial and continuing investigations into need and eligibility demonstrate both its general adherence to *the rule of determining actual, individual needs and resources* and the lack of necessity for a presumption regarding excess iving space. The New York regulations deal in some detail with the investigations to be made both initially 18 NYCRR §§ 351.1-.6, and on a continuing basis, 18 NYCRR §§ 351.20-.21. The *actual* resources are investigated in depth. 18 NYCRR § 351.2(e). Among the facts to be determined by documents, personal observation, personal and collateral interviews and other means are the residence and family composition. Each member of the household is investigated as to age, relationship to other members, marital status, employment, and the like. 18 NYCRR § 351.2(c). The place of residence must itself be specifically investigated and approved. 18 NYCRR § 351.3. Every six months all variable factors of need must be reconsidered, re-evaluated, and verified. 18 NYCRR § 351.21 (b)(2). In short, it is absurd to create an administrative presumption concerning resources of income or space, when the actual information is on file and subject to immediate verification. Let it be remembered that New York justified its "home visits" in *Wyman* v. *James*, 400 U.S. 309 (1971), by its claimed need to gather this very type of information.

[12] This conclusive presumption, which the majority styles a fair inference, is in any case in violation of due process. *See Owens* v. *Parham, supra. See also United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

it—dependent children in need and their responsible families. The fallacy underlying the majority's view, and the argument of the State on this issue, is that the lodger is not a "beneficiary" of the AFDC grant either in law or fact. The lodger is rather the beneficiary of the AFDC family's generosity, and more likely that of the AFDC children's mother. If a lodger is not present in the household, the family receives a rent allowance determined by the State to be proper for the family. If a lodger then is invited into the household, he would not receive any benefit from the AFDC grant, the entire amount of which the family is entitled to without him; he is rather a recipient of that charity which the family wishes to extend *from its own resources.*[13] He is there at the family's forbearance

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[13] To carry out the majority's analysis, when the welfare mother puts a dollar bill in the collection plate on Sunday, the church is "sharing in AFDC benefits," and presumably the majority would uphold a state regulation which provided for withholding from the AFDC grant a sum equal to any donations to charity. The supposed justification remains the same—the State provides AFDC grants for the support of the dependent child and not for the benefit of ineligibles, and the fallacy is the same. Rather the State provides the family with what it determines to be the necessary resources, but then the resources belong to the family to utilize as it best sees fit. Absent this element of choice a welfare state would be a police state.

If the State believes that the resources are being misused to the detriment of the child, it has a vast battery of provisions which it may use to protect the child. Initially and primarily there are counseling services for the family. 18 NYCRR §§ 386.1-.10. This may range from simple caseworker counseling to specialized psychiatric help. Where a recipient has demonstrated an inability to handle the cash resources provided, restricted payments may be made rather than the normal unrestricted payments. Soc. Services Law § 350-a; 18 NYCCR § 381.3(a). For instance, if the head of the household wastes money so that rent payments cannot be met, the State may undertake to pay the shelter allowance directly to the landlord. Soc. Services Law § 143-b; 18

or pleasure and he has no right to remain. He receives nothing from the State, and when the family's shelter allowance is reduced, nothing is taken from him. He continues to live in the household at the pleasure of the family.

Clearly what the State is doing is not keeping welfare funds from the ineligible by this regulation.[14] Rather it seeks to punish the welfare family for using its own resources in a manner of which the Commissioner disapproves in advance in every case. Whether the Commissioner is attempting to enforce the "middle class morality" mentioned by the majority, or just trying to save money any way he can, the federal statute and regulations, and the unanimous case law forbid the State from enforcing its predilections *which are irrelevant to the welfare of the child*[15] by depriving the eligible child of its needs. *See, e.g., Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Lewis* v. *Martin, supra; King* v. *Smith, supra; Doe* v. *Ellis,* 350 F. Supp.

NYCCR § 381.3(c). The overall payments may be made to a person other than the head of household or to an agency on behalf of the eligible child. 18 NYCCR § 381.8. A homemaker may be provided in the house for the family. 18 NYCCR § 387.2. Intensive family casework services are available. 18 NYCRR §§ 456.1-.7. In extreme cases the chidren may be removed from the home and placed in foster care. Soc. Services Law § 358-a; 18 NYCRR § 450.3. And, of course, the whole gamut of procedures relating to neglected children is available to the State. Soc. Services Law §§ 374, 397, 398; Penal Law §§ 260.05, .10; Family Court Act § 1011-74.

[14] If the lodger were receiving welfare funds for which he was ineligible, he could be prosecuted for welfare fraud. Soc. Services Law § 145.

[15] Neither the State nor the majority has asserted that the regulation in question in any way safeguards the welfare of the eligible child. Nor does it appear how by reducing the child's benefits, which in one of the cases before us resulted in a notice of eviction, the child's welfare would be enhanced.

375 (D.S.C. 1972) (three-judge court); *Saddler* v. *Winstead,* 332 F. Supp. 130 (N.D. Miss. 1971); *Doe* v. *Schmidt,* 330 F. Supp. 159 (E.D. Wis. 1971) (three-judge court); *Doe* v. *Shapiro,* 302 F. Supp. 761 (D. Conn. 1969) (three-judge court), *appeal dismissed,* 396 U.S. 488 (1970). And that is exactly what is being done here.

To repeat, to reduce the shelter allowance of an AFDC family by virtue of the presence in the home of a non-paying lodger does not deprive the lodger of any benefits —only the family which allows him to stay can do that— but rather deprives the needy family, and especially the needy child who is the object of the AFDC program, of them.

If the State believes that the non-paying lodger should not get a "free ride," the State may legislate or proceed against the lodger, but should it be permitted to deprive *the needy child?* The State may attempt to obtain reimbursement from the lodger for the use of the family's resources,[16] but should it be able to punish the child because the head-of-household does not require the lodger to pay for his shelter? *Cf. Doe* v. *Schmidt, supra; Doe* v. *Shapiro, supra.*

There are only two other points made by the majority requiring passing mention. First, there is a suggestion that an "economy of scale" operates in the sense that the per capita housing cost decreases when there is a lodger. It is nonsense, however, to say that the cost of housing to the recipient family decreases when there is a *non-paying* lodger. Moreover, an economy of scale does not reduce the *total* cost of anything, and yet here, where the recipient family is legally and factually responsible for the total

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[16] The State already requires the applicant for welfare to assign certain assets and to utilize all resources for the production of income. *See* 18 NYCRR §§ 352.15(d), 352.23, 352.25, 352.27, 352.28.

rent bill, the State is providing a *smaller* total allowance although the lodger contributes nothing. An economy of scale would operate only if the lodger were presumed to pay his pro rata share. But such a presumption would be clearly unlawful, as the majority concedes and 45 C.F.R. § 233.90(a) provides. The presence of a lodger is, finally, irrelevant to the rent the family pays. A certain rent is due and payable; if the State reduces the rent allowance, the difference will either be made up out of food budget—literally out of the needy child's mouth—or it will not be made up, resulting in a notice of eviction. Plaintiff Taylor with her eviction notice would surely laugh, although perhaps a little bitterly, at the majority's suggestion that by housing her destitute and disabled sister the family's "actual cost of housing" was reduced.

Finally, in a footnote, the majority quotes from a letter from HEW in response to questions from the State. The suggestion of the footnote is that HEW has taken a position on the question before us. To the contrary, however, in that same letter HEW acknowledged that it approves both plans like new York's and those which grant full shelter allowance despite the presence of non-recipients in the household. In other words, HEW here, just as it did prior to *King* v. *Smith, supra,* has not resisted a state's attempt to evade its own regulations and the federal statutes. *See also Shea* v. *Vialpando,* 42 U.S.L.W. at 4563 n. 11.

I would affirm the judgments below, because, as Judge Bauman said,

> the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. . . . This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

Hurley v. *Van Lare,* 365 F. Supp. 186, 195 (S.D.N.Y. 1973).

Because the regulation denies the eligible child his basic needs for no reason related to the purpose of the federal statute, it violates that statute and the implementing regulations.[17]

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[17] The majority's decision in its own words is premised upon what the majority concludes the *New York regulations* to "imply" or to be "based on," or their "objective." The Appellate Division in *Battle* v. *Lavine, supra,* the highest state court to have spoken on the issue, has explicitly rejected the interpretation of the majority here. Whether this court should be bound by the interpretation of state law made by *Battle* is a question not argued or briefed to us as *Battle* was decided after argument before this court. Nevertheless, it is clear that the majority decision, based as it is on an interpretation of state law, does not preclude New York courts from reaching an opposite conclusion, as the *Battle* court did, as to the conformity of the state regulations with the federal statute and regulations.

APPENDIX C

Opinion of the Single District Judge in *Hurley* v. *Van Lare.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3423

ROSE HURLEY, individually and on behalf of her minor dependent children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York,

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York,

LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

APPEARANCES

Legal Aid Society of Westchester County (Martin A. Schwartz, Jerold S. Slate, Lawrence S. Kahn, of Counsel) for plaintiffs and intervenor D'Alessio.

Legal Aid Bureau of Buffalo, Ins. (Michael A. O'Connor, Margaret Dodd, of counsel) for intervenor Clark.

Appendix C.

Louis J. Lefkowitz, Attorney General, State of New York (Judith A. Gordon, Gene B. Mechanic, of counsel) for defendants Van Lare and Lavine.

John J. S. Mead, County Attorney, Westchester County (Richard W. MeAtamney, of counsel) for defendant Kurtis.

BAUMAN, D. J.

Before the court is yet another action challenging the manner in which the State of New York allocates its welfare funds. Plaintiff and her three minor children receive public assistance pursuant to the Aid to Families with Dependent Children (AFDC) program. The action is brought on their behalf, and on behalf of all others similarly situated, to enjoin the enforcement of 18 N.Y.C.R.R. § 352.31 (a)(3)(iv)[1] and 18 N.Y.C.R.R. § 352.30(c) and (d)[2] and to secure retroactive public assistance payments of which she claims to have been unlawfully deprived.

The plaintiff has moved for class determination pursuant to Rule 23 of the Federal Rules. She also seeks summary judgment pursuant to Rule 56, and thereby, a permanent injunction against the enforcement of the attacked state regulations as well as retroactive welfare payments. Plaintiff argues that these regulations are violative of the due process and equal protection clauses of the Fourteenth Amendment and repugnant to the rights of privacy and freedom of association secured by the First, Ninth, and Fourteenth Amendments. She also contends that they are violative of the Supremacy Clause (Article VI) in that they conflict with the provisions of subchapter IV of the Social Security Act, 42 U.S.C. § 601 et seq. and the regulations promulgated thereunder. The defendants in turn have moved to dismiss the action pursuant to Rules 12(b)1 and

12(b)6 of the Federal Rules on the grounds that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. In addition, Phyllis D'Alessio and Loretta Clark, both mothers receiving aid under the AFDC program, seek to intervene pursuant to Rule 24(b)(2). The defendants oppose their intervention.

I.

A brief exposition of Mrs. Hurley's situation may help illuminate the difficulty in which she and others in her purported class find themselves.[3]

Mrs. Hurley has been living apart from her husband since 1967 and claims not to have seen or heard from him since that time. From November, 1970 through February, 1971 a male who contributed nothing toward her maintenance or that of her three children lived with her. Her rent during that period was $150 per month. Upon learning of the presence of a male lodger, the Westchester County Department of Social Services, without explanation as to how the figure was reached, deducted $35 per month for the four months from plaintiff's recurring grant.

On November 12, 1970 plaintiff requested a State Fair Hearing which was held on March 22, 1971 in White Plains, New York. In a decision rendered September 20, 1971, Barry Van Lare, the Acting Commissioner of the Department of Social Services, upheld the grant reduction but ruled that the Westchester Department should have deducted $30 rather than $35 from her stipend.[4]

Plaintiff claims that she still wishes to associate and reside with this male friend, but is afraid to do so because of the anticipated reduction in her public assistance grant.

II.

I shall first consider plaintiff's motion that this be designated a class action pursuant to Rule 23(a)[5] and Rule

23(b)2[6] of the Federal Rules. The proposed class would consist of "all residents of the State of New York who are or were receiving public assistance, who have had their grants reduced, terminated, suspended or denied, or who are threatened with reduction, termination, suspension or denial, solely because of the enforcement of 18 N.Y.C. R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d)."

It would appear that all of the requirements in the above cited rules have been met and that this may proceed as a class action. Plaintiff's efforts to demonstrate satisfaction of the numerosity requirement, Rule 23(a)1, have been thwarted in part by the state's failure to compile any statewide statistics on the number of recipients whose grants have been reduced because of the presence of lodgers.[7] However, the defendants did furnish statistics compiled by a research analyst in the State Department of Social Services indicating that as of November 1, 1972, there were 477 such cases in New York City. That figure alone would render the class so numerous that joinder would be impracticable, and it may reasonably be assumed that the total number in the state is far larger still.

Plaintiff's claims are typical and there can be no dispute that the questions of law or fact are common to the class. It has been frequently noted in similar cases that the state's promulgation of an unconstitutional regulation and/or its failure to comply with regulations of the Department of Health, Education, & Welfare affects all welfare recipients in the same manner. *Seritella* v. *Engelman*, 339 F.Supp. 738 (D.N.J. 1972); *Almenares* v. *Wyman*, 334 F.Supp. 512 (S.D.N.Y. 1971), affd., 453 F.2d 1075 (2nd Cir. 1971). For the purpose of determining the constitutionality of the challenge regulations, it does not matter that plaintiff and some members of the class have received Fair Hearings and others have not. The exhaustion of state administrative remedies is not a prerequisite to the maintenance of an action under 42 U.S.C. § 1983. *Sostre* v. *McGinnis*, 442

F.2d 178 (2nd Cir. 1971); *Carter* v. *Stanton*, 405 U.S. 669 (1972); *Damico* v. *California*, 389 U.S. 416 (1967). Accordingly, even where some of the named plaintiffs have exhausted their administrative remedies, the class may nevertheless include others who have not. *Doe* v. *Lavine*, 347 F.Supp. 357 (S.D.N.Y. 1972); *Broussard* v. *Schlumberger Well Services*, 315 F.Supp. 506 (S.D.Tex. 1970); *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969). Hence such factual distinctions among members of the class have little bearing on the resolution of the central question presented by this action, namely, the constitutionality of the New York regulations.

I have no doubt that the representative party will fairly and adequately protect the interests of the class. The Legal Aid Society of Westchester County, which represents both Mrs. Hurley and Mrs. D'Alessio, one of the intervenors, has demonstrated a high standard of advocacy in both its written and oral presentations before this court, and I am certain that it will continue to do so.

Finally, it is also clear that the instant action is precisely of the type contemplated by Rule 23(b)2. The Advisory Committee Notes to Rule 23 with reference to this subsection point up its applicability:

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, setting the legality of the behavior with respect to the class as a whole, is appropriate . . . Action or inaction is directed to a class within the meaning of this subsection even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating un-

lawfully against a class, usually one whose members are incapable of specific enumeration." (Citations omitted).

Examples of cases challenging state welfare laws in which class action status has been granted are legion. *Almenares* v. *Wyman, supra; Gaddis* v. *Wyman,* 304 F.Supp. 717 (S.D.N.Y. 1969); *James* v. *Goldberg,* 302 F.Supp. 478 (S.D.N.Y. 1969); *Doe* v. *Shapiro,* 302 F.Supp. 761 (D.Conn. 1969). The motion to designate the instant case a class action is therefore granted.

III.

I am also satisfied that this court has jurisdiction to entertain this action pursuant to 42 U.S.C. § 1983 and its jurisdictional complement, 28 U.S.C. § 1343(3). It is now well settled that jurisdiction exists under § 1343(3) only if the complaint presents a substantial constitutional question. *Almenares* v. *Wyman,* 453 F.2d 1075, 1082 (2nd Cir. 1971); *Merriweather* v. *Burson,* 439 F.2d 1092 (5th Cir. 1971). I therefore intend to review the plaintiff's constitutional arguments. The survey shall be brief because, as shall appear more fully below, it appears that the question presented by this case can be resolved on statutory grounds alone. I therefore need consider the substantiality, but not the substance of the constitutional claims.

Plaintiff makes four separate constitutional arguments. First, she urges that the regulations, by discouraging the presence of a male lodger, exert a chilling effect on her right to free association secured by the First and Fourteenth Amendments. See generally, *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). Second, she argues that they violate her right of privacy and

right to
home. *G*
ley v. *Ge*o freedom from governmental intrusion into the
U.S. 438*Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stan-*
tion im*Jeorgia*, 394 U.S. 557 (1969); *Eisenstadt* v. *Baird*, 405
contribu38 (1972). Third, plaintiff contends that the assump-
conclusiplicit in the challenged regulations that a lodger will
clause o,ute his *pro rata* share of shelter costs constitutes a
380 U.S.sive presumption in violation of the Due Process
Vlandis of the Fourteenth Amendment. *Carrington* v. *Rash*,
*States I*S. 89 (1965); *Stanley* v. *Illinois*, 405 U.S. 645 (1972);
(June 2*s* v. *Kline*, —— U.S. —— (June 11, 1973); *United*
violate *Department of Agriculture* v. *Murry*, —— U.S. ——
Amendr25, 1973). Her final argument is that the regulations
classes e the equal protection clause of the Fourteenth
who rec*l*ment by discriminating arbitrarily between two
lodger s of equally needy families: those without a lodger,
See *Da*eceive a full welfare stipend, and those with whom a
v. *Hack* resides, and whose stipend is accordingly reduced.

With*andridge* v. *Williams*, 397 U.S. 471 (1970); *Jefferson*
other t*ckney*, 406 U.S. 435 (1972).
process hout implying any judgment on the merits of the
tion. T three contentions,[8] I find that at least plaintiff's due
creatin ss argument raises a substantial constitutional ques-
portuni The Supreme Court has long held that "a statute
Fourte ng a presumption which operates to deny a fair op-
(1932). nity to rebut it violates the due process clause of the
Illinois eenth Amendment." *Heiner* v. *Donnan*, 285 U.S. 312
made i). To cite one recent example, the Court in *Stanley* v.
death *is*, supra, found unconstitutional an Illinois law which
unmar cluded illegitimate children the wards of the state upon the
was en of their mothers and which consequently presumed
being rried fathers to be unfit to raise such children. It con-
linois d that, as a matter of due process, an unmarried father
ntitled to a hearing on his fitness as a parent before
deprived of his children. The Court observed that Il-
"insists on presuming rather than proving Stanley's

unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . ." 405 U.S. at 658.

In several recent cases courts have concluded that statutes similar to those at issue here created conclusive presumptions incapable of being contravened by a factual showing. In *Boucher* v. *Minter,* 349 F.Supp. 1240 (D.Mass. 1972), a three judge court struck down a provision of the Massachusetts AFDC program which reduced the shelter allowance to needy children upon the remarriage of their mother. The court held, inter alia, "[t]he irrebuttable presumption underlying the defendants' policy, namely, that after the mother's remarriage the children in the AFDC family do not need a shelter allowance and that household expenses will be paid by the stepfather is unrealistic and arbitrary." See also *Jenkins* v. *Georges,* 312 F. Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham,* 350 F.Supp. 598 (N.D. Ga. 1972); *Rosen* v. *Hursh,* 464 F.2d 731 (8th Cir. 1972).

Because 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and §§ 352.30(c) and (d) automatically prorate a family's shelter allowance upon the presence of a male, I conclude that plaintiff's contention that a conclusive presumption is thereby created in violation of the Due Process Clause presents a substantial constitutional question and is a sufficient predicate for jurisdiction under 28 U.S.C. § 1343(3). I wish to emphasize that I do not pass on the substance of this question, both because the issue can be resolved on narrower ground and because it would be improper for a single judge to do so. I find only that the plaintiff has adequately refuted defendants' contention that the constitutional arguments presented here are frivolous or a mere pretext for placing the statutory arguments before this court.

III.

Before turning to plaintiff's contention that the challenged New York regulations are inconsistent with regulations promulgated under the Social Security Act, two observations are in order. First, it is now established that a suit to enjoin the enforcement of a state statute on the ground of its asserted repugnancy to a federal statute does not require the convening of a three judge court. *Swift and Company* v. *Wickham,* 382 U.S. 112 (1965); *Ex parte Buder,* 271 U.S. 461 (1926); *Ex parte Bransford,* 310 U.S. 354 (1940); *Case* v. *Bowles,* 327 U.S. 92 (1946). Second, where a court is presented with both constitutional and statutory claims, it is obliged to consider first the statutory claims. *Rosado* v. *Wyman,* 397 U.S. 397 (1970). I find myself in agreement with Judge Gurfein that "the most appropriate course for the district judge is to first face the statutory claim alone, since on it a three judge court is not required and since a three-judge court, if convened, would have to face it first." *Doe* v. *Lavine,* 347 F.Supp. 357 at 359-360 (S.D.N.Y. 1972). See also *Doe* v. *Gillman,* 347 F.Supp. 483 (N.D. Iowa 1972); *Saddler* v. *Winstead,* 327 F.Supp. 568 (N.D. Miss. 1971); *Connecticut Union of Welfare Employees* v. *White,* 55 F.R.D. 481 (D. Conn. 1972).

The AFDC program, 42 U.S.C. § 601 et seq., is one of three major categorical public assistance programs established by the Social Security Act of 1935. Its purpose is the encouragement of "the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services" to such children. 42 U.S.C. § 601. The dependent child is defined, at 42 U.S.C. § 606(a), as one "who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent.'"

Appendix C.

§ 606(a) was first carefully scrutinized by the Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968). At issue there was an Alabama regulation denying AFDC assistance to the children of any mother (1) who lived with a man; (2) who was visited frequently by a man "for the purpose of cohabiting"; or (3) who cohabited with a man even outside her children's home. Under the Alabama scheme it was irrelevant whether the man was legally obligated to support the children, and equally irrelevant whether he did in fact make any contribution toward their support. The State of Alabama argued before the Court that its regulation simply further refined the definition of "absent parent" under § 606(a); it further contended that its regulation significally reduced the welfare caseload, discouraged sexual intercourse, and put "informal" families on the same footing as other families. The Court rejected all of these contentions. It found it "inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children." It further concluded that "Congress intended the term 'parent' in . . . 42 U.S.C. § 606(a) to include only those persons with a legal duty of support." The Court there struck down Alabama's regulation because it defined "parent" in a manner inconsistent with the federal statute.

The Court's exegesis of § 606(a) in *King* v. *Smith* was codified in 45 C.F.R. § 203.1.[10] That provision defined "parent" in accordance with the Court's interpretation and further provided that in determining a child's financial eligibility, a State could consider "only such income as is actually available for current use on a regular basis." In *Lewis* v. *Martin*, 397 U.S. 552 (1970), the Court had occasion to consider these new regulations, and that decision has a readily apparent relevance for the instant case. That case presented a challenge to a California law providing that welfare payments to children who lived with their

mother and stepfather "or an adult male person assuming the role of spouse" (MARS) shall be computed after consideration is given to the income of the stepfather or MARS. The Court noted (without explicitly adverting to the Due Process Clause of the Fourteenth Amendment) that this statute conclusively presumed that a child's needs were reduced by the income available from the man in the house whether or not such income was used to meet these needs. It upheld 45 C.F.R. § 203.1 as a reasonable exercise of HEW's administrative judgment and held that "[i]n the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support." 397 U.S. at 559-560. The *Lewis* case has frequently been invoked by lower federal courts to invalidate state statutes which reduce AFDC grants to reflect the support supposedly provided by a stepfather or "man in the house." *Rosen* v. *Hursh,* 464 F.2d 731 (8th Cir. 1972); *Gilliard* v. *Craig,* 331 F.Supp. 587 (W.D.N.C. 1971), affd., 409 U.S. 807 (1972); *Gaither* v. *Sterret,* 346 F.Supp. 1095 (N.D.Ind. 1972), affd., 409 U.S. 1070 (1972). See also, *Reyna* v. *Vowell,* 470 F.2d 494 (5th Cir. 1972); *Solman* v. *Shapiro,* 300 F.Supp. 409 (D.Conn. 1969), affd. 396 U.S. 5 (1969).

In the case at bar plaintiff argues that 18 N.Y.C.R.R. § 351(a)(3)(iv) and § 352.30(c) and (d) are inconsistent with 45 C.F.R. § 233.90. She claims that these statutes, by effecting a *pro rata* reduction in the rental stipend because of the presence of a lodger, conclusively presume that the lodger is contributing to the family's income, whether or not he can or does make such a contribution. Indeed, the hearing examiner's decision specifically included the following finding: "The record establishes that the man residing with appellant [Mrs. Hurley] was not willing to

assume responsibility for the appellant or her children of which he is not the acknowledged or adjudicated father. In addition, no contribution is made by the lodger to the appellant." Plaintiff argues that the state statutes which effect a reduction in the rental stipend in disregard of such circumstances violate the policies enunciated in the *King* and *Lewis* decisions and embodied in 45 C.F.R. § 233.90.

Defendants, unable to distinguish those cases convincingly, offer but one argument in rebuttal. They contend that the only purpose of the challenged statutes is to prevent the allocation of AFDC funds to non-eligible persons. The regulations "merely pro rate the rent among the eligible persons and compute the shelter allowance accordingly, leaving the lodger and non eligible to pay his own way." [11] It would be unfair, the defendants imply, to permit a male lodger, who need not have qualified for public assistance, to share in the family's rental stipend. In order to prevent state subsidy of an ineligible recipient, the argument continues, the stipend must simply be reduced by the lodger's proportionate share.

I find the defendants' argument utterly unpersuasive and hold that the challenged regulations are inconsistent with 45 C.F.R. § 233.90. Despite the defendants' professed concern that ineligibles not receive a rental stipend, the inevitable result of these regulations is to reduce, perhaps drastically, the stipend for those who are eligible. In the case of a mother with one child, for example, the presence of a non-contributing male lodger would reduce the rental stipend by 33⅓%. This devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend allotted for food and clothing.

The regulations thus conflict directly with § 233.90, a portion of which states: "[u]nder this requirement, the inclusion in the family, or the presence in the home, of a

'substitute parent', or 'man in the house', or any individual other than that described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state." Despite the defendants' protestations to the contrary, a *pro rata* reduction does indeed assume that the male lodger will pay his own way, whether or not he actually does. That is precisely the assumption found impermissible in *King* and *Lewis*.

It should also be noted that the regulations here under scrutiny are in one sense far cruder than were those at issue in *Lewis* v. *Martin, supra*. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend *regardless* of the lodger's income. Hence children who could qualify for a full stipend under the California plan (i.e., if the MARS in fact had no income) would have their rental stipend reduced under the New York scheme. The Supreme Court found the California regulations not calibrated carefully enough to consider income actually available to the child. These New York statutes, I find, are even less sensitive instruments.

This is not the first attempt by a state to reduce a shelter allowance on the theory that the cohabitation of eligibles and non-eligibles makes the state responsible for only a proportionate share of the rent. In *Boucher* v. *Minter*, noted at pages 8-9, supra, the Massachusetts statute operated similarly. The court there perceptively identified the fallacy in the reasoning of the statute:

> "Although she has become a member of her new husband's family, the mother remains the head of a family, distinct for purposes of AFDC, comprised of herself and her children and is no less logical a conduit for shelter payments for the children if they in fact

remain in need. That family unit remains unchanged since the stepfather does not join it in law; and if he does not join it in fact, by economic participation in its expenses, there is no basis in law or fact for an irrebuttable presumption that the shelter needs of the children have not continued despite the remarriage."

That flaw inheres in the New York regulations as well. See also, *Jenkins* v. *Georges*, 312 F. Supp. 289 (W.D.Pa. 1969); *Owens* v. *Parham*, 350 F. Supp. 598 (N.D.Ga. 1972).

In conclusion, then, I find that 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c)(d) are inconsistent with 45 C.F.R. § 233.90 and thus violative of the Supremacy Clause of the Constitution. Accordingly, an appropriate injunction shall issue against their enforcement.

V.

Two matters only remain for resolution. The first is the motion by Phyliss D'Alessio and Loretta Clark to intervene pursuant to Rule 24(b)2 of the Federal Rules.[12] Little would be gained by setting forth the proposed intervenors' backgrounds, for they are in all relevant details similar to that of Mrs. Hurley. Both are mothers receiving AFDC payments who have lost contact with the fathers of their children, and both have lived or are now living with men with whom they wish to reside on a permanent basis. Mrs. Clark has already received a Fair Hearing and suffered a *pro rata* reduction in her stipend. Mrs. D'Alessio has merely been threatened with a reduction.

A motion under Rule 24(b)2 is addressed to the discretion of the district court, *Lipsett* v. *United States*, 37 F.R.D. 549 (S.D.N.Y. 1965), appeal dismissed, 359 F.2d 956 (2nd Cir. 1966), and we are continually reminded that the rule should be liberally construed. *Peterson* v. *United States*, 41 F.R.D. 131 (D.Minn. 1966). However, I believe that

the rule should be construed in accordance with its underlying purpose, which is the prevention of a multiplicity of lawsuits involving common questions of law or fact. *Reich* v. *Webb*, 336 F.2d 153 (9th Cir. 1964), cert. denied, 380 U.S. 915 (1965). That purpose is already satisfied where, as here, the proposed intervenors fall within a class action designation. Consequently, the liberality with which the rule is customarily construed must give way to considerations of judicial economy and the avoidance of the confusion caused by multiple claimants. I have therefore concluded that where a suit has been designated a class action, admitting intervenors *who raise no new issues* and who fall within the class merely clutters the action unnecessarily.[13] See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944). I understand Rule 23(d) at least to suggest that to intervene in a class action, applicants must show more than mere identity of questions of fact and law. Were that provision construed otherwise, it would mean that any member of the class, *ipso facto*, has a right to intervene and litigate the action fully. Such a construction would render class actions just as unmanageable as some are wont to fear them.[14]

I have concluded that the proposed intervenors here have not made a showing sufficient to justify their intervention; they have done nothing more than demonstrate factual and legal claims in common with the class. There is no danger that the case will become moot as to the named plaintiff, a circumstance which has been found to justify intervention. *Gaddis* v. *Wyman*, 304 F.Supp. 713 (S.D.N.Y. 1969). Nor is there any contention that the proposed intervenors' interests will be prejudiced or impaired by inadequate representation on the part of the named plaintiff. *Rolle* v. *New York City Housing Authority*, 294 F.Supp. 574 (S.D.N.Y. 1969); *Gabriel* v. *Standard Fruit & S.S. Co.*, 448 F.2d 724 (5th Cir. 1971). There was but one factor weigh-

ing in favor of their intervention. Both Mrs. Clark and Mrs. D'Alessio, because they were confronted with the imminent loss of welfare benefits, sought preliminary injunctions. Mrs. Hurley, who had formerly suffered a reduction but was now receiving her full stipend, did not. At oral argument, however, the representative of the Attorney General's office agreed that the stipends of the proposed intervenors would not be reduced during the pendency of this motion. Their motions for preliminary injunctions were accordingly deemed withdrawn. Had the Attorney General not thus graciously acceded to this court's request, the intervention of the two additional parties would have served a legitimate need in protecting the interests of that portion of the class facing an immediate loss of benefits. In the present posture of the case, the presence of the intervenors serves no discernible purpose, and their application to intervene is accordingly denied.

VI.

In addition to injunctive relief, plaintiff has also sought an order allowing her retroactive welfare payments for the months in which her stipend was improperly reduced. The question of retroactive welfare benefits is, at the moment, an unusually delicate one for the district judges of this Circuit. In *Rothstein* v. *Wyman*, 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), our Court of Appeals, following *Ford Motor Co.* v. *Department of the Treasury of Indiana*, 323 U.S. 459 (1945), held that the Eleventh Amendment foreclosed a court from directing the retroactive payment of public assistance benefits. This view has its adherents. See *Westberry* v. *Fisher*, 309 F. Supp. 12 (D.Me. 1970); *Francis* v. *Davidson*, 340 F. Supp. 351 (D.Md. 1972); *Boucher* v. *Minter*, supra, at fn. 6.

On the other hand, four different three judge courts have granted the payment of retroactive benefits, and each of

those decisions was affirmed summarily by the Supreme Court. *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1969), affd. sub nom. *Wyman* v. *Bowens*, 397 U.S. 49 (1970); *Shapiro* v. *Thompson*, 270 F. Supp. 331 (D.Conn. 1967), affd., 394 U.S. 618 (1969); *Zarate* v. *State Dept. of Health and Rehabilitative Services*, 347 F. Supp. 1004 (S.D.Fla. 1971), affd., 407 U.S. 918 (1972); *Sterrett* v. *Mothers and Childrens Rights Organization* —— F. Supp. —— (N.D. Ind. 1972), affd., 409 U.S. 809 (1972). The *Gaddis* and *Shapiro* decisions antedated the Second Circuit's decision in *Rothstein* but the court did not regard them as binding precedents on the Eleventh Amendment question. Rather, Judge McGowan, speaking for the court, stated that the Supreme Court had not "as yet addressed itself specifically and authoritatively to this issue." Given this view of the value of the summary affirmance, it is unlikely that the decision of the Court of Appeals would have been in any way altered by the affirmances in *Zarate* and *Sterrett*.

It is generally thought that a summary affirmance is a decision on the merits having precedential value. See *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, 400 U.S. 932 (1970) (White, J., dissenting); *Barton* v. *Sentner*, 353 U.S. 963 (1957) (Burton and Clark, J.J., dissenting); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13 (2nd Cir.), cert. denied, 395 U.S. 935 (1969); *Doe* v. *Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972), affd., 478 F. 2d 537 (2nd Cir. 1973); Stern and Gressman, *Supreme Court Practice* 197 (4th ed. 1969). Nevertheless, the *Rothstein* court was obviously aware that the Eleventh Amendment defense had not been considered at length by the district courts in *Gaddis* and *Shapiro* (nor was it in *Zarate* or *Sterrett*). The court may then have concluded that, even though the question of retroactive benefits had technically been before the Supreme Court in those cases,

the new gloss placed on the problem by the Eleventh Amendment defense had not. Of course, if the import of the court's remark that the Supreme Court "has not yet come to grips" with the question be taken literally, it suggests that a summary affirmance has no precedential value whatever. See *Dillenburg* v. *Kramer,* 469 F.2d 1222 (9th Cir. 1972).

The matter now however appears ripe for determination by the Supreme Court. In *Jordan* v. *Weaver,* 472 F.2d 985 (7th Cir. 1973) the Seventh Circuit concluded (a) that the prior Supreme Court affirmances were entitled to full precedential force; (b) that at all events, the Eleventh Amendment is no bar to the payment of retroactive benefits; and (c) that even if the Eleventh Amendment was a bar, Illinois had "constructively consented" to such actions. The Supreme Court has granted certiorari —— U.S. ——, 41 USLW 3644 (June 12, 1973) and obviously will address the problem in the coming term.

Meanwhile, however, as a district judge I consider myself bound both by the Second Circuit's construction of the Eleventh Amendment and by its view of the precedential force of the various summary affirmances. Although suits by welfare recipients are numerous, the question of the Eleventh Amendment as a defense to the payment of retroactive benefits has been treated but rarely. I therefore regard the *Rothstein* decision as authoritative and accordingly deny plaintiff's motion for the payment of such benefits here.

In conclusion, plaintiff's motion that this proceed as a class action is granted. Plaintiff's motion for summary judgment is granted to the extent that an injunction shall issue permanently enjoining the enforcement of 18 N.Y.C.R.R. § 352.31(a)(3)(iv) and § 352.30(c) and (d). Plaintiff's motion is denied to the extent that it seeks an order directing the payment of retroactive welfare pay-

ments, and that portion of the complaint is dismissed. Defendants motion to dismiss for failure to state a cause of action is denied, as is its alternative motion for summary judgment. The motions of Clark and D'Alessio to intervene are also denied.

The parties are directed to settle an order on notice providing for an appropriate form of injunctive relief.

Dated: October 3, 1973.

ARNOLD BAUM
U. S. D. J.

FOOTNOTES

[1] 18 N.Y.C.R.R. § 352.31(a)(3)(iv):

§ 352.31 *Estimate of need and application of income*

(a) For applicant or recipient.

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

* * *

(iv) When the man is unwilling to assume responsibility for the women or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(c)."

The reference to § 352.30(c) is erroneous; it is clear from the text of the section, set out at footnote 2, infra, that the reference should be to § 352.30(d).

[2] 18 N.Y.C.R.R. § 35230 *Persons included in the budget*

"(c) When an applicant or recipient wilfully fails or refuses to comply with the requirements of Part 385 of this Title, the needs of the family shall be determined as if he were a member of the family, however, the grant shall be provided on a pro rata basis for the eligible family members only.

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for non receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and

treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance."

[3] The ensuing account is adopted from plaintiff's statement submitted pursuant to Rule 9-G of the Southern District Rules in support of her motion for summary judgment. With one unimportant exception, none of the facts in that statement is disputed by the defendants.

[4] This computation was reached in accordance with the controverted state regulations, cited at footnotes 1 and 2, which provide that if a male lodger does not contribute at least $15 per month, the family shelter allowance shall be reduced by the lodger's *pro rata* share. The previous shelter allowance had been $150, and thus the male lodger's *pro rata* share was 1/5 x $150 or $30.

[5] Rule 23(a):

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[6] Rule 23(b)(2):

"(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or"

[7] See the letter of Judith A. Gordon, Assistant Attorney General, to Jerold S. Slate of the Legal Aid Society of Westchester County, appended as Exhibit C to the Slate affidavits.

[8] From his concurring opinion in *United States Department of Agriculture* v. *Moreno*, —— U.S. —— at —— (June 25, 1973), it is apparent that Mr. Justice Douglas would regard the arguments based on privacy and freedom of association as substantial. In considering § 3(e) of the Food Stamp Act of 1964, 7 U.S.C.

§ 2012(e), which excludes from participation in the food stamp program any household containing an individual unrelated to any other member of that household, he observed: "[t]he right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod." The majority found the statute violative of the Due Process Clause of the Fifth Amendment and therefore did not reach these questions. See, however, the opinion of Judge McGowan for the three judge court below, *Moreno* v. *United States Department of Agriculture*, 345 F.Supp. 310 at 314 (D.D.C. 1972).

[9] 42 U.S.C. § 606(a) reads in full as follows:

"(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

[10] 45 C.F.R. § 203.1 is set out in substance in *Lewis* v. *Martin*, 397 U.S. 552 (1970) at p. 556. It has been succeeded by 45 C.F.R. § 233.90(a), which incorporates its predecessor with relatively few changes. § 233.90(a) reads as follows:

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's step-parent who is ceremonially married to the child's natural or adoptive parent, and is legally obligated to support the child under State law or general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-th-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for as-

suming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such ne tincome as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in home, of a "substitute parent" or "man-in-the-house" or any only such net income as is actually available for current use the absence of proof of actual contributions."

[12] Rules 14(b):

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[13] By the same reasoning, permissive intervention is most appropriate where the court has determined a case unsuitable for class action treatment. Thus in *Doe* v. *Lavine*, 347 F.Supp. 357 (S.D.N.Y. 1972), Judge Gurfein granted motions to intervene by eight persons while finding that factual discrepancies precluded a class action designation. Similarly, Judge Mansfield in *Boone* v. *Wyman*, 295 F.Supp. 114 (S.D.N.Y. 1969), affd., 412 F.2d 857 (2nd Cir. 1969), cert. denied, 396 U.S. 1024 (1970), permitted intervention under Rule 24(b)2 but expressed doubt as to whether the prerequisites for a class action existed.

[14] Some courts have permitted intervention in class actions by applicants raising the same issues, and retaining the same attorneys, as the named plaintiffs. *Epstein* v. *Weiss*, 50 F.R.D. 387 (E.D.La. 1970), *Hicks* v. *Crown Zellerbach*, 49 F.R.D. 184 (E.D.La. 1968). The underlying rationale there appears to be that in such circumstances it hardly makes any difference whether intervention is permitted or denied.

APPENDIX D

Memorandum and Order of the Single District Judge in *Taylor* v. *Lavine.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR: CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

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Appendix D.

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WEINSTEIN, D.J.

Plaintiffs, for themselves and others similarly situated, move for summary judgment; defendants move to dismiss on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs' motion must be granted.

Annie Taylor's rent allowance has been reduced by one-third on the presumption that her sister, who lives with her, is contributing to its payment. Charlotte Otey has had her rental allowance reduced by one-third on the presumption that her son, who lives with her, is contributing to household expenses. There is no evidence of such contributions by those adults living in plaintiffs' homes.

The ruling is said to be required by New York State Welfare Regulation 18, N.Y.C.R.R. 352.30(d) reading in part as follows:

> "A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving

public assistance shall not be in the budget and shall be deemed to be a lodger or boarding lodger . . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance." 18 NYCRR 352.30(d) (1st and 4th sentences)

This regulation, incorporating as it does a presumption of financial support having no basis in fact, is alleged to be inconsistent with the applicable federal regulation, 45 C.F.R. 233.90(a), 36 Fed. Reg. 3868, reading as follows:

"A state plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the employment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first

sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contribution."

Almost identical claims were before the District Court for the Southern District of New York, *Hurley* v. *VanLare*, 72-C-3423. The *Hurley* case involved a nonrelated male sharing the home. In a full opinion dated October 3, 1973 Judge Bauman ruled that the action was properly brought on behalf of a class and that the New York regulation was invalid because it was in conflict with federal law. See Appendix A, attached. The opinion is convincing and its reasoning on class action status, jurisdiction, inconsistency of the state regulation and injunctive relief is adopted by this court.

The class in *Hurley* can be construed as including the class in the instant case. If it is not, then a fortiori the plaintiffs before us are entitled to injunctive relief since it is no more likely that a sister or a son will share in the support of a household than will an adult unrelated cohabitating male.

The issue of retroactive benefits is more difficult. As plaintiffs admit (Brief pp. 29-30), the Second Circuit, unlike other circuits, denies retroactive benefits. Judge Bauman, as I do, felt bound by the rule of this Circuit. Were it open to the court, it would adopt what it considers the fairer rule, permitting the court to order retroactive payments where the family, and particularly the children, are continuing to suffer because of the deprivation. It is well known that rents must be paid and that given a fixed allowance and a rising rent or a fixed rent and a decreasing allowance, poor families will have to reduce expenditures for such necessities as food or clothing. It may well be that in the instant case there has been, for example, skimping on purchases of winter clothing or blankets for the

children in order to make up the one-third rental allowance deficit. This may well adversely affect their health during the coming winter when, we can judicially notice, fuel will be short in this area.

The defendants are urged to reexamine the situation of the plaintiffs to insure that there will be no adverse consequences to the children involved as a result of the failure of this court to order retroactive benefits.

Settle order on forty-eight hours notice.

So ordered.

Dated: Brooklyn, New York, October 10, 1973.

JACK B. WEINSTEIN
U.S.D.J.

APPENDIX E

Judgment and Order of August 15, 1974.

UNITED STATES DISTRICT COURTS

72 Civ. 3423 A.B.

FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

73 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix E.

This cause coming on to be heard upon remand from the United States Court of Appeals for the Second Circuit sub nom. *Taylor* v. *Lavine* for the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine plaintiffs' constitutional claims, and a consolidated three-judge court having been convened, and the plaintiffs having moved for a class action determination pursuant to Rule 23 of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and motions to intervene as parties plaintiffs having been made pursuant to Rule 24 of the Federal Rules of Civil Procedure on behalf of Phyllis D'Alessio and Loretta Clark in *Hurley* v. *Van Lare,* and by Francesca Aloise in *Taylor* v. *Lavine,* and defendants Lavine and Van Lare having moved to dismiss the actions pursuant to Rule 12 of the Federal Rules of Civil Procedure or in the alternative for summary judgment, and the defendants not opposing plaintiffs' motion for a class action determination, and the three-judge court on June 26, 1974 having heard testimony and considered the evidence pursuant to Rule 43(e) of the Federal Rules of Civil Procedure, and having heard the argument of the attorneys for the parties herein, and the three-judge court having considered the evidence, memoranda of law, and due deliberation having been had, and upon the filing of the opinion of the three-judge court dated and filed the 5th day of August, 1974, and Circuit Judge Hays having filed a dissenting opinion, it is hereby

ORDERED that defendants' motions to dismiss the action or in the alternative for summary judgment be and the same hereby are denied, and it is further

ORDERED that the above entitled consolidated actions are maintainable as a class action pursuant to Rule 23 of the

Federal Rules of Civil Procedure. The class of plaintiffs consist of all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with the reduction, termination, suspension or denial of public assistance solely because of the presence of a "lodger" in the home pursuant to 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d); and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same is granted to the extent hereinafter set forth; and it is further

ORDERED that defendants, their officers, agents, servants, employees, and successors be and hereby are permanently enjoined from enforcing 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and from terminating, suspending or reducing grants of public assistance because of the presence in the home of a family receiving public assistance of a person who is not a recipient of public assistance and who has no legal obligation to support the public assistance family; and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied to the extent it seeks an order directing the payment of retroactive welfare payments; and it is further

ADJUDGED AND DECREED that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that 18 N.Y.C.R.R. §§ 352.31(a)(3)(IV) and 352.30(d) and defendants' policy and practice of terminating, suspending or reducing grants of public assistance because of the presence in the public assistance family's home of a person who

is not a recipient of public assistance and who has no legal obligation to support the public assistance family, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Dated: New York, New York
August 15, 1974.

/s/ ARNOLD BAUMAN

/s/ JACK B. WEINSTEIN

.....

Judgment Entered:

August 15, 1974.

.....
Clerk

APPENDIX F

Notice of Appeal From Judgment and Order of August 15, 1974.

UNITED STATES DISTRICT COURTS

FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

72 Civ. 3423 A.B.

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Plaintiffs,

against

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Defendants.

72 Civ. 699

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Plaintiffs,

against

ABE LAVINE, individually, and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Defendants.

Appendix F.

SIRS:

PLEASE TAKE NOTICE that the defendants BARRY VAN LARE and ABRAHAM LAVINE hereby appeal to the Supreme Court of the United States from the Judgment and Order of the thiree-judge district court (HAYES, C.J. dissenting) dated the 15th day of August, 1974 and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the same day which declared the action to be maintainable as a class action, permanently enjoined the enforcement of 18 N.Y.C.R.R. §§ 352.30(d) and 352.31(a)(3)(iv) to the extent that said regulations authorize the termination, suspension or reduction of grants of public assistance solely because of the presence of a lodger and non-recipient in the home of a public assistance recipient and declared said regulations unconstitutional to the same extent, and the said defendants hereby appeal from each and every part of said Judgment and Order as well as the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
August 20, 1974

Yours, etc.,

LOUIS J. LOEKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

By: JUDITH A. GORDON
Assistant Attorney General
Office and P.O. Address
Two World Trade Center
New York, New York 10047

Appendix F.

To: Martin Schwartz, Esq.
Westchester Legal Aid Society
Attorney for Plaintiff Hurley
56 Grand Street
While Plains, New York 10601

Leonard S. Clark, Esq.
Nassau County Law Services Committee, Inc.
Attorney for Plaintiffs Taylor and Otey
285 Fulton Avenue
Hempstead, New York 11550

Hon. Gerald Harris
Westchester County Attorney
Attorney for Defendant Louis P. Kurtis
County Office Building
148 Martin Avenue
White Plains, New York 10601

Hon. John F. O'Shaughnessy
Nassau County Attorney
Attorney for Defendant Shuart
1 West Street
Mineola, New York 11501

Filed August 20, 1974

APPENDIX G

Related Statutes and Regulations.

STATUTES AND REGULATIONS

FEDERAL STATUTES

42 U.S.C.

§ 601. *Appropriations*

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out this part. The sums made available under this section shall be used for making payments to states which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must

* * *

(7) . . . provide that the State agency shall, in determining need, take into consideration any other

income and resources of any child or relative claiming aid to families with dependent children, or any other individual living in the same household as such child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income;

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

§ 606. *Definition*

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(b) The term "and to families with dependent children" means money payments with respect to, or . . .

medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living [as well as the spouse of such relative under certain conditions, and those of an individual described under § 602(a)(7)] . . . .

* * *

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual himself or together with any one or more of the other relatives so specified as his (or their) own home.

FEDERAL REGULATIONS

45 C.F.R.

§ 233.90 *Factors specific to AFDC*

(a) *State plan requirement*

A State plan under Title IV-A [AFDC] of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive

parent and is legally obligated to support the child under a State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only if the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

STATE STATUTES

Social Services Law

§ 131. *Assistance, care and services to be given*

1. It shall be the duty of the Social Services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves in accordance with the requirements of this Article [5—Assistance and Care] and other provisions of this chapter [55 of the Consolidated Laws of New York State]. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

• • •

Appendix G.

3. For needy persons who are members of a family household, the standard of need for determining eligibility for public assistance shall be as prescribed by section one hundred and thirty-one-a of this chapter and applicable federal requirements • • •.

§ 131-a *Monthly grants and allowances of public assistance*

1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall, in accordance with the provisions of this section and regulations of the department, provide home relief, veteran assistance, old age assistance, assistance to blind, aid to the disabled and aid to dependent children, to needy persons who constitute or are members of a family household, who are determined to be eligible in accordance with standards of need established in subdivision two. Provision for such persons, for all items of need, less any available income or resources which are not required to be disregarded by other provisions of this chapter, shall be made in accordance with this section. Such provision shall be made in monthly or semi-montlhy allowances and grants within the limits of the schedules included in subdivision three of this section except for additional amounts which shall be included therein for shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home and for other items for which specific provision is otherwise made in article five. As used in this section the term "shelter" may include a grant not to exceed seven hundred and fifty dollars toward the purchase of an interest in a co-operative • • •.

(2) The following schedule shall be standard of monthly need for determining eligibility for all cate-

gories of assistance in and by all social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six
$84	$134	$179	$231	$284	$329

For each additional needy person in the household there shall be added an additional amount of forty-five dollars monthly.

In addition to the above, the standard of need shall include amounts for shelter and fuel for heating, amounts for additional costs and meals for persons who are unable to prepare meals at home and amounts for other items when required by individual case circumstances for which specific provision is otherwise made in article five of this chapter.

* * *

§ 343 *Declaration of Object* [*of Aid to Dependent Children Program*]

It is hereby declared a state policy that aid to dependent children be provided under the provisions of this title in every county of the state.

§ 344. *Responsibility*

1. Each public welfare district shall be responsible for providing aid to dependent children, under this title, to persons eligible therefor who reside in its territory * * *.

§ 349. *Eligibility*

A. Aid to dependent children shall be given to a parent or other relative as herein specified for the

benefit of a child or minor under eighteen years of age, or of a minor under twenty-one years of age who is a student regularly attending high school in pursuance of a course of study leading to a high school diploma or its equivalent, or is regularly attending a course of vocational or technical training designed to fit him for gainful employment or of a college or university whose curriculum is approved by the state department of education • • •

§ 350. *Character and Adequacy*

1. (a) Allowances shall be adequate to enable the father, mother or other relative to bring up the child or minor properly, having regard for the physical, mental and moral well-being of such child or minor, in accordance with the provisions of section one hundred thirty-one-a of this chapter and other applicable provisions of law • • •.

STATE REGULATIONS

18 N.Y.C.R.R.

§ 352.3. *Rent allowances*

(a) Each social services district shall establish a monthly allowance schedule for rent based on that number of rooms, with or without heat, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in

excess of the appropriate maximum of such schedule.[*]

• • •

(c) For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend or SSI beneficiary, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis but not in excess of the appropriate agency maximum for the number of people in the assistance grant.[**]

§ 352.30. *Persons included in the budget*

(a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. Members of the family temporarily absent from the home shall be included as a member of the household in the budgetary estimate, such as children or minors attending school away from home, except when maintenance is provided without cost.

• • •

---

[*] A state-wide maximum monthly shelter allowance schedule by county and by public assistance family size has been published in the 18 N.Y.C.R.R. but has not yet become effective.

[**] Effective July 26, 1974. Former subdivision (c) stated:

For children or adults in receipt of public assistance residing in the home of a self-maintaining non-legally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a pro rated basis.

Appendix G.

§ 352.31. *Estimate of need and application of income.*

(a) FOR APPLICANT OR RECIPIENT.

(1) The estimated of need for any applicant or recipient shall include all items of need as specified in these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of need shall be the appropriate amount provided in accordance with the schedues and other provisions of these regulations. To the extent that an item offered is otherwise provided it shall not be included in the estimate of need but the manner in which such item is provided shall be recorded.

APPENDIX H

Excerpts From the State Defendants' Answer and From the Case Record of Appellee Rose Hurley.

The state defendants' answer stated in part.

Factual Allegations

* * *

14. On or about September 15, 1970, a caseworker from the Westchester County Department of Social Services made an unannounced "home visit" to Mrs. Hurley at the first floor apartment on Hillside Avenue. During the course of that visit the caseworker observed the following items of furniture in the apartment among others: *Living room*—Color console television set; plush velvet sofa; plush velvet arm chairs; coffee table with ornaments; draperies; wall to wall carpet (green); *Master bedroom*—bedroom set; wall to wall carpet (blue); *Twins bedroom*—bunk beds; wall to wall carpet (red); *Doreen's bedroom*—wall to wall carpet; *Kitchen*—five piece dinette set.

15. Upon inquiry to Mrs. Hurley, the caseworker was advised that the foregoing items had been given to Mrs. Hurely by a male friend (one ADR) and that the furniture which had been purchased with the November 18, 1967 grant was stored in the basement with the exception of the furniture in Doreen's room. (A copy of the caseworker's report of the September 15, 1970 "home visit" is annexed hereto and marked Defendants Exhibit "A" [DXA]).*

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* Plaintiffs attorney has advised that he contests the allegations made in the foregoing paragraph. Accordingly, defendants plan to offer proof of these facts at trial and/or through depositions taken subsequently.

Appendix H.

The case record of appellee Rose Hurley maintained by the Westchester County Department of Social Services states in part:*

HURLEY, Rose
210 Hillside Avenue
Mount Vernon, New York

ADC

9/15/70

Home Visit and Reinvestigation:

Since worker had not visited the Hurley's household, since Mrs. H. had moved downstairs, worker made an unannounced home visit to the Hurley's household. Mrs. Rose Hurley lives in a 6 room apartment on the first floor of a two family house. The rent remains $150.00 and the utilities are extra. The security has been transferred from Mrs. Hurley's upstairs apartment to her downstairs apartment. The landlord is Mr. Peter Adamo, PE-8-3162 of 18 Maple Avenue, Pelham, New York. Mrs. Hurley claims that she was able to obtain this apartment after the Adamo's separated and are now divorced. There is no verification of rent and worker asked that receipt for three months be presented to our office by 9/28/70, or we will hold her 10/1 grant. Mrs. Hurley lives with her three children and Mrs. Hurley's husband's whereabouts are unknown. Mrs. Hurley is seeking a divorce but has not filed for one as of yet. Mrs. Hurley claims she has not "gotten around to obtaining one".

Health:

The twins, Jamie and John, born 8/9/67, are fine; their health is good; their physician is Dr. Kessler of Mount

* The ensuing report was submitted to the court as the State Defendants Exhibit A annexed to their Answer.

Vernon. Daughter, Doreen, 4/18/62, is a diabetic for which Mrs. Hurley gives her insulin, Globin N-40, every morning. Mrs. Hurley maintains that Doreen will be taught to administer these injections by the Mt. Vernon Nursing Service. Doreen was hospitalized on 5/12/70, released either 5/29 or 6/4/70 from the Presbyterian Hospital, New York City for cystitis fibrosis (see correspondence). Mrs. Hurley stated that this occurrence placed a great strain on her physical as well as her mental health. She stated that she would visit Doreen every day, getting the twins prepared to stay with their grandparents each day, traveling back and forth to New York City and returning for evening visits to see Doreen. After Doreen was discharged from the hospital, she placed additional strain on her mother as she was very demanding by being bedridden. Mrs. Hurley claims that Doreen was promoted to the third grade considering what she had experienced medically in the last year. Doreen had a tutor from the Board of Education. Doreen attends St. Catherine's Parochial School in Pelham, New York. Mrs. Hurley expressed satisfaction over Doreen's improvement but she maintains that Doreen must be given special attention due to her condition.

At this time, worker questioned Mrs. Hurley as to her new furniture. Mrs. Hurley maintainss that her boyfriend [ADR], helps her out and that he completely furnished her apartment. The living room [is] comprise[d] of colored console television, spanish mediterranean plush velvet sofa of red and green. The two high back plush velvet arm chairs are of green and red and there are gold and black draperies in this living room. There is also green wall to wall carpeting and a very heavy ornamentated spanish mediterranean coffee table with two crystal ornaments. In the master bedroom [ADR], has purchased a huge mediterranean bedroom set and blue wall to

wall carpeting. The twins room is in a red and white with red and white bunk beds and red wall to wall carpeting. Doreen's furniture remains the same but [ADR] has also placed wall to wall carpeting in her room. Mrs. Hurley claims that [ADR] has several businesses and that he is in his early 30's and that he lives at 240 East Prospect Avenue, Mt. Vernon. His apartment, she maintains makes hers look like nothing, in other words there is no comparison between the two. In the kitchen [ADR] has purchased a beautiful 5 piece dinette set which has high back chairs of black vinyl and a hexagon shaped dinette table. When worker questioned Mrs. Hurley about previous furniture, she claim that she had stored most of these in the basement because some day she plans to marry [ADR] and have a home of her own in which these items may be placed also.

APPENDIX I

Opinions in *Battle* v. *Lavine*.

Decision and Order of Special Term.

Short Form Order August 10 1973

SUPREME COURT

STATE OF NEW YORK

SPECIAL TERM, PART 1.—NASSAU COUNTY

Present: HON. ALEXANDER BERMAN, Justice.

In the Matter of the Application of

LOIS BATTLE, individually, etc.,

Petitioner,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, etc., ABE LAVINE, and JAMES M. SHUART, etc.,

Respondents.

Upon the foregoing papers it is ordered that this motion in an Article 78 proceeding to annul and reverse a determination made by a fair hearing referee which confirmed a decision of the Department of Social Services is denied.

The petitioner contends that there has been an arbitrary and capricious denial of her rights with regard to the elimination of her shelter allowance.

The Department of Social Services questioned the amount of her shelter allowance after receiving information that the petitioner was the mother of a child born out of wedlock, and that the putative father of the child is the

son of the petitioner's landlord. Both the putative father and the landlord reside in the same house as the petitioner. Upon receipt of the above information, the Department of Social Services sought to decrease the petitioner's shelter allowance, in conformance with 18 NYCRR 352.3(c), which states:

> "For children or adults in receipt of public assistance residing in the home of a self-maintaining, non-legally responsible relative or friend, the allowance for rent and for other shelter costs shall be computed on a pro-rata basis."

There is no doubt that the petitioner falls within the definition of the regulation. The Court does not agree with petitioner's strained interpretation to the contrary.

The petitioner also contends that 18 NYCRR 352.3(c) is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and furthermore, that the State regulation is in conflict with 45 C.F.R. Sec. 233.90(a), which states in relevant part:

> ". . . the inclusion in the family or the presence in the house of a 'substitute parent', or 'man-in-the-house' or any individual . . . is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State . . ."

The regulation, 18 NYCRR 352.3(c) does *not* contravene this regulation. This section of the NYCRR has been upheld in Matter of Noto v. Lavine, 71 Misc 106, and Matter of Morning v. Wyman, 39 A.D.2d 645. The regulation was applied recently by Mr. Justice DiPaola of this Court, in Codrington v. Lavine & Shuart Index No. 6319/73. The regulation does not make any recipient ineligible because of the nature of the relationship of those living in the same abode as the recipient.

Appendix I.

In carrying out the valid New York regulation, the action initiated by the Department of Social Services sought verification of mortgage payments. This documentation was requested so that the shelter allowance could be *adjusted,* not *terminated.* The petitioner's failure to abide by the lawful regulations of the NYCRR caused the Department of Social Services to correctly discontinue the petitioner's shelter allowance.

The petitioner claims she will suffer immediate and irreparable harm unless she is re-granted her shelter allowance. Nowhere has the petitioner shown any evidence that she has attempted to obtain shelter elsewhere and that she was unable to obtain same.

The stay heretofore granted prohibiting revocation of the shelter allowance assistance is extended for thirty days from the date of this order, to permit the petitioner to obtain shelter elsewhere.

Dated, August 9, 1973.

A. BERMAN
J. S. C.

Appendix I.

Opinion of the Appellate Division, Second Department.

April 22, 1974

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

HOPKINS, Acting P.J., SHAPIRO, CHRIST, BRENNAN and BENJAMIN, JJ.

[SAME TITLE]

APPEAL from a judgment of the Supreme Court at Special Term (ALEXANDER BERMAN, J.), dated August 9, 1973 and entered in Nassau County, which denied petitioner's application pursuant to article 78 of the CPLR (1) to annul a determination of the Department of Social Services of the State of New York affirming, after a statutory fair hearing, a determination of the Nassau County Department of Social Services reducing petitioner's public assistance grant, (2) to declare unconstitutional a provision in the Rules and Regulations of the State Department of Social Services and (3) to direct respondents to adjust petitioner's grant.

BENJAMIN, J. This is an appeal by the petitioner from a judgment of the Special Term in Nassau County which denied her application pursuant to article 78 of the CPLR (1) to annul a determination of the respondent Department of Social Services of the State of New York, made after a fair hearing, affirming a decision of the respondent local agency reducing the petitioner's public assistance grant; (2) to declare unconstitutional the pertinent provision of

the Department's regulations; and (3) to direct the respondents to adjust the petitioner's grant, effective May 1, 1973, to include her previously budgeted shelter allowance in the sum of $125 per month.

We reverse the judgment and grant the petitioner all the relief sought by her.

The petitioner was a recipient of aid in the category of Aid to Families with Dependent Children. She was receiving a shelter allowance of $125 per month. She rented one room in a one-family, two-story dwelling. Also residing in the residence were the landlord and his son and daughter and two other tenants. In August of 1972, the petitioner informed the Nassau County Department of Social Services (hereinafter "the agency") that she was pregnant. A child was born in the following March and the birth certificate indicates that the landlord's son is the child's father.

On January 10, 1973, the petitioner received from the agency a notice of intent to reduce her grant by $125 (the amount of the shelter allowance) for the following reason: "Your landlord refuses to provide us with verification of his mortgage so that we can allow you a proportionate share of shelter since you are living with 'friends'." The statutory authority for a reduction based upon one's living with a friend is found in subdivision (c) of section 352.3 of the Regulations of the Department of Social Services of the State of New York, the challenged section. This section states: "For children or adults in receipt of public assistance residing in the home of a self-maintaining, nonlegally responsible relative or friend, the allowance for rent and/or other shelter costs shall be computed on a prorated basis."

On January 23, 1973, the petitioner requested a fair hearing to review the decision to reduce the grant. A hearing at which the petitioner was represented by coun-

sel was held on April 4, 1973 and a decision affirming the reduction was rendered on April 25, 1973. On May 30, 1973, the petitioner commenced the instant proceeding pursuant to article 78 of the CPLR. Relief was denied and this appeal followed.

We note initially that, while an article 78 proceeding is generally not the proper vehicle by which to challenge the constitutionality of a statute or ordinance, if all of the necessary parties to an action for such relief have appeared in such a proceeding, the court may treat the application as an action for a declaratory judgment and may retain jurisdiction to resolve any constitutional issues (*Matter of Gold* v. *Lomenzo*, 29 N Y 2d 468). The respondents claim here that the Department of Health, Education and Welfare of the United States (H.E.W.) is a necessary party which was not joined in the proceeding. But where a petitioner has not sought to cut off all federal funds by his action, HEW is not a necessary party (see, e.g., *Shapiro* v. *Thompson*, 394 U. S. 618; *King* v. *Smith*, 392 U. S. 309; *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346, 1349). Accordingly, for the pupposes of reaching the constitutional issue involved, we will consider the relief sought as requesting a declaratory judgment.

The decision at Special Term held, *inter alia*, that the challenged section was not violative of the Supremacy Clause of the United States Constitution (art. VI, clause 2) in that it did not contravene subdivision (a) of section 233.90 of title 45 of the Code of Federal Regulations, which states, in relevant part:

> "The inclusion in the family, or the presence in the home, of a 'substitute parent', or 'man in the house', or any individual * * * is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state."

We do not agree and now hold that section 352.3 (subd. [c]) must fall as, on its face, it is violative of the Supremacy Clause. The section sanctions that which the above-mentioned Federal regulation prohibits.

Two positions have been urged to take subdivision (c) of section 352.3 out of the proscription. Neither succeeds. The first is that the purpose of the State regulation is to forbid a non-eligible individual from indirectly receiving State assistance from a qualified recipient by living with that person (the respondents' contention). The second is that the purpose of the State regulation is to assure that the qualified recipient is not receiving additional support from the person with whom he is living.

The first position was expressly rejected and found inconsistent with the above-mentioned Federal regulation in *Hurley* v. *Van Lare* (365 F. Supp. 186). Notwithstanding the respondents' protestations that their concern is that ineligibles not receive a rental stipend, the inevitable result of the State regulation under attack is to reduce, perhaps drastically, the stipend for those who are eligible. Here, the allowance was reduced by 100%, which must force the recipient to attempt to meet the rental payments out of portions of her welfare stipend intended for food and clothing.

The second position has been widely rejected and its assertion in the past actually led Congress to enact subdivision (a) of section 233.90 of the Federal regulation (see *King* v. *Smith*, 392 U. S. 309, *supra; Hurley* v. *Van Lare*, 365 F. Supp. 186, *supra; Boucher* v. *Minter*, 349 F. Supp. 1240). To argue that this position does not contravene the Federal regulation is thus totally without merit.

Accordingly, we reverse the judgment, on the law, without costs but with disbursements, annul the determinations in question, declare subdivision (c) of section 352.3 of the State Regulations unconstitutional and direct the respond-

ents to reinstate the shelter allowance to the petitioner as of May 1, 1973.

HOPKINS, Acting P.J., SHAPIRO and BRENNAN, JJ., concur.

CHRIST, J. (concurring in part). I concur with the majority that the judgment should be reversed and that the petitioner's shelter allowance should be reinstated. I differ in that I do not find it necessary to reach the constitutionality of subdivision (c) of section 352.3 of the State Regulations. That provision pertains only to recipients of welfare aid who are "residing in the home of a self-maintaining, nonlegally responsive relative or friend." The petitioner is not such a recipient and does not come within the provision.

The petitioner is unmarried and lives with her year-old infant son in a furnished room for which she pays $125 per month rent. The house is occupied by four separate families with separate accommodations. The landlord's son is the father of the petitioner's child. He does not live with the petitioner and the record shows her to be the sole occupant of her rented room. The landlord-grandfather has no obligation to support the petitioner and he does not do so. He charges and collects the rent.

The respondents discontinued the rent allowance to the petitioner because she was unable to procure information about the landlord's mortgage obligations.

The record is devoid of any proof that the petitioner has the mortgage information or whether she could even procure it. There is no evidence to indicate that the rent paid is unreasonable or that the petitioner does not need the shelter allowance. Additionally, there is no proof that the landlord and the petitioner are acting collusively. And the landlord has not been shown to be a responsible relative or friend. It is important to note that the petitioner,

while under oath at the hearing, was never examined as to any of these facts.

It would seem to me, as it did to the hearing officer, that to require this petitioner, as a condition to receiving welfare relief payments for shelter, to procure a statement from the landlord concerning his mortgage payments is unreasonable. The best source of this information would be the public mortgage record and, if more is required, a subpoena to the landlord to produce his records and to take testimony concerning them would be in order.

This case must be decided for the appellant whether the State regulation is held constitutional or not. Accordingly, that question is immaterial to the result and we need not reach it.